

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





77-1140

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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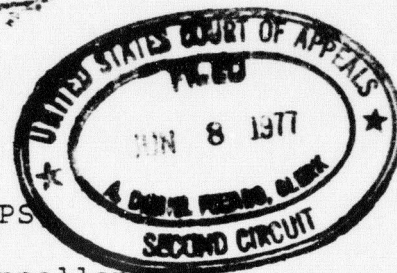
UNITED STATES OF AMERICA,

Appellee,

v.

DAVID STIRLING, JR., WILLIAM G.  
STIRLING, HAROLD M. YANOWITCH,  
EDWIN SCHULZ and RUBEL L. PHILLIPS

Defendants-Appellants.



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JOINT APPENDIX OF DEFENDANTS-APPELLANTS  
DAVID STIRLING, JR., WILLIAM G. STIRLING AND HAROLD M. YANOWITCH

Volume III - Pages A 421 to A 673

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1 ps8

2 All right, Mr. Gaynor.

3 MR. GAYNOR: I respectfully move for judgment  
4 of acquittal pursuant to Rule 29 with respect to my  
5 clients, David Stirling and William Stirling.

6 May I approach the Court with an argument on  
7 behalf of William Stirling?

8 THE COURT: What do you mean?

9 MR. GAYNOR: I would like to review the  
10 evidence against William Stirling, if I may.

11 THE COURT: Surely.

12 MR. GAYNOR: Your Honor, I think that a review  
13 of the evidence in this case fails to show that upon all  
14 of that evidence when taken as a whole that a reasonable  
15 mind could fairly conclude that the defendant William  
16 Stirling was guilty beyond a reasonable doubt. Certainly,  
17 the test of a fair preponderance of the independent non-  
18 hearsay evidence in applying it to William Stirling leaves  
19 not any fair preponderance evidence but indeed a paucity  
20 and insufficient as against William Stirling. There are  
21 some 38 witnesses that testified at the trial. I believe  
22 there is only one witness, and that was Mr. Levering, who  
23 in any way directly said that Mr. William Stirling had  
24 anything to do with what I consider the basis of the  
25 prosecution here. Namely, that he did have some review



1 ps9

2 of the annual report. With respect to all of the land  
3 transactions involving Raseac, 57-31 and Thun, nowhere  
4 has Mr. William Stirling's name been mentioned as being a  
5 participant in any of that. Except if my review is  
6 correct I believe Mr. Wynn and Mr. Grago did say Mr.  
7 William Stirling's presence was in attendance at one of  
8 the meetings.

9 All of the labor individuals testified they  
10 had no conversations with William Stirling. Two of them  
11 never even met him. That, in substance, takes care  
12 of practically all of the Government's evidence.

13 Absent any further inquiry by the Court, I  
14 respectfully ask this Court to render a judgment of  
15 acquittal on behalf of William Stirling.

16 (Continued on next page.)  
17  
18  
19  
20  
21  
22  
23  
24  
25

4b

1 jpa

2 THE COURT: Well, it is a crisp and cogent  
3 enough argument. Instead of inquiring of you I will  
4 inquire of the government as to what's your evidence  
5 against William Stirling, and through whom was it ad-  
6 duced?

7 MR. MACBETH: From a number of different  
8 sources, your Honor. As to William Stirling's in-  
9 volvement with the misreporting of the labor relations  
10 and the underlying relationship to the labor union  
11 leaders, there is testimony from Mr. Ruggiano that Mr.  
12 William Stirling had urged him to buy the stock and  
13 had urged him to take it as part of that whole arrange-  
14 ment that's come out through a number of witnesses.  
15 There is, of course, the Government's Exhibit 319, the  
16 falsified voucher for expenses where what seemed to  
17 be an apparent consciousness of guilt, William Stirling,  
18 in filling in what those expenses were, three or  
19 four times writes down meeting with union labor offi-  
20 cials, and labor actually shrieks from that document.

21 There are further false vouchers from the  
22 funds which were used to pay off the labor leaders'  
23 loans which were expense vouchers in William Stirling's  
24 name.

25 There is also his signature on the Shea



1 jpa2

2 take-over letter, Government's Exhibit 290. There  
3 is from Levering the evidence that he had control  
4 and approval over the information that was released  
5 to the financial media and also over the news that was  
6 released on the Mississippi project and operation.

7 Further, some of the exhibits, Government's  
8 Exhibit 806 and 807, for instance, show his handwriting  
9 and his approval on underwriter's requests. His  
10 okays and information requests through Merrill Lynch and  
11 on a document dealing with Merrill Lynch's due-dili-  
12 gence review. He was, of course --

13 THE COURT: Remind me, what are 806 and  
14 807.

15 MR. MACBETH: They came in through stipu-  
16 lation.

17 MR. MAC DONALD: That was the Dienstag  
18 memorandum in which it was noted that the Brown, Wood  
19 reviewers wouldn't be able to take the sales contracts  
20 out of the premises and they were permitted to read  
21 three jobs other than the Mississippi. Mr. Yanowitch  
22 asked for Bill and David Stirling's approval to limit  
23 their access to information across the top of that  
24 page. I think Bill Stirling initials it.

25 THE COURT: I understand what you are saying.

1 jpa3

2 I don't need to see it.

3 MR. MACBETH: He, of course, gave detailed  
4 attention to the annual report, as is also apparent  
5 from Mr. Levering's testimony and from the exhibits  
6 that Mr. Levering identified.

7 He had directed to him and in his posses-  
8 sion documents dealing with the company's accounting  
9 policies generally and its accounting policies in Mis-  
10 sissippi. His signature, of course, is on the power  
11 of attorney and thus indirectly on all the documents  
12 filed with the Securities and Exchange Commission.  
13 He was the president of the company. He attended its  
14 board meetings, its finance committee meetings;  
15 its executive committee meetings are recorded and  
16 documents which were moved in by stipulation. In  
17 looking through the minutes of the company's meetings  
18 he is there making one corporate decision after another.

19 THE COURT: Was he mentioned -- and my  
20 notes don't show since they are not complete -- in the  
21 testimony of your first witness, McCann?

22 MR. MACBETH: Yes, he was in the room  
23 at the time McCann came into the room with the vouchers.  
24 And when David Stirling went out into the hall and gave  
25 McCann the money to leave town he also gave him the



1 jpa4

2 car of William Stirling's wife.

3 THE COURT: I remember the car. I  
4 thought I remembered the car.

5 MR. MACBETH: On the question of his  
6 involvement with these other land operations he was,  
7 of course, a shareholder and participant in some of  
8 the corporations which gave up stock to Peter Thun.  
9 So that again, while you don't have direct conversations,  
10 his interests are involved and his stock and his finan-  
11 cial interests are involved in those transactions.

12 So that on the basis of that wide variety  
13 of evidence the government contends that there is  
14 sufficient evidence for a reasonable man to conclude  
15 beyond a reasonable doubt that he was guilty of the  
16 conspiracy under the substantive counts of the indict-  
17 ment.

18 MR. GAYNOR: May I respond briefly, your  
19 Honor?

20 First of all, I would like to say there  
21 is no proof of any falsity of the documents that Mr.  
22 Macbeth referred to. That is a jury question, true,  
23 but there is no proof that those documents were false.

24 Secondly, Mr. McCann, I think carefully,  
25 did not testify as to any conversation of that meet-

1 jpa5

2 ing with Mr. William Stirling. He said he had a  
3 conversation with David Stirling.

4 I think, your Honor, when you look and  
5 recite the evidence that Mr. Macbeth just recited against  
6 William Stirling against the evidence when taken as  
7 a whole, I think that the test has been met so that  
8 Mr. William Stirling is not a defendant subject to  
9 review by this jury under that test.

10 THE COURT: I think, considering the things  
11 Mr. MacBeth has reviewed and having in mind the position  
12 of Mr. William Stirling in the corporation, there is  
13 a jury question as I see it now.

14 The motion, although it is certainly not  
15 frivolous, is denied.

16 Mr. Feldshuh?

17 MR. FELDSHUH: For the record, your Honor,  
18 pursuant to Rule 29, I respectfully move for a judgment  
19 of acquittal as to the defendant Harold M. Yanowitch.

20 THE COURT: All right. It is denied,  
21 for the record.

22 MR. EATON: Your Honor, I'd like to make  
23 my motion specifically paragraph by paragraph in this  
24 indictment and I would like your Honor to treat these  
25 as separate motions to dismiss --



1 jpa6

2 THE COURT: Different counts? I am  
3 not going to dismiss paragraphs. If you want to move  
4 against specific counts you may, but I won't let you  
5 go paragraph by paragraph by paragraph. There are  
6 a lot of paragraphs here and we don't acquit people by para-  
7 graphs.

8 MR. EATON: I may be stating the motion  
9 in the wrong form, your Honor, but what I am thinking  
10 of specifically is the Natelli case, where there was  
11 a big discussion in the Court of Appeals about whether  
12 there was sufficient evidence on part of the case and  
13 whether the jury could have been told that as to  
14 part of the case they could not convict co-defendant  
15 Scancorole on part. I am asking for that same sort  
16 of relief for Mr. Schulz on certain parts of the  
17 alleged scheme.

18 THE COURT: If you are asking for relief  
19 now in the form of things to be told to the jury, then  
20 this is the wrong time to do it. I am hearing motions  
21 to acquit, not applications for instructions. It  
22 will be time enough when the case goes to the jury,  
23 if there are such exclusions to be put before them,  
24 to do it then. You advise me before then of what  
25 things you want done then.

1 jpa7

2 MR. EATON: I will do that. But my  
3 understanding is, your Honor, if there is insufficient  
4 evidence on the part of the conspiracy at this point,  
5 Mr. Schulz should not be required to put on any defense  
6 as to those r of the schene.

7 COURT: I don't grant rule 29 motions  
8 as to parts. I dn't have a view on whether he's in-  
9 volved in parts. Every defendant is not involved  
10 in parts of this indictment, or almost every. I am  
11 not going to rule on which paragraph does or does not  
12 embrace which defendant at this time. I don't think  
13 that's the office of a motion to acquit.

14 I will hear your Rule 29 motion and not  
15 by paragraphs. That's the ruling. If it is  
16 erroneous, I think I have made the error as clear as you  
17 could possibly meet it to do.

18 MR. EATON: I am interested in making  
19 that clear, your Honor. When I said parts, I was  
20 referring to count 1, paragraphs 10 through 16 indi-  
21 vidually, and to count 9, paragraph 2 individually.  
22 I would have wanted to make separate motions as to  
23 each of those paragraphs and your Honor has denied that.

24 THE COURT: I have foreclosed you from  
25 hearing that, unless the government has an interest in



1 jpa8

2 seeing that I don't make too many mistakes.

3 MR. MAC DONALD: No, sir. The Natelli  
4 charge in issue had nothing to do with the scheme in  
5 count 1 or the conspiracy in count 2.

6 MR. EATON: I would move simply, your  
7 Honor, for judgment of acquittal on each and every count  
8 as to Mr. Schulz.

9 THE COURT: That's denied. I'm sure  
10 I meant very seriously what I said to you. If you  
11 have specific instructions you want given to the jury  
12 I will consider them very carefully, and you better  
13 start preparing them if they are not already prepared.

14 All right, Mr. Mukasey.

15 MR. MUKASEY: Your Honor, I move also  
16 for a judgment of acquittal pursuant to rule 29, and  
17 to move as well on the basis cited by Mr. Eaton for --  
18 well, for excision essentially from the indictment of  
19 those paragraphs in which Mr. Phillips is not mentioned  
20 which are set forth in the motion for a severance as  
21 a grounds for severance, to have those paragraphs  
22 excised as to him.

23 THE COURT: Okay. That's denied.

24 Now, what's your first step, Mr. Gaynor,  
25 are you going to start with the movie?

1 hba6 Klein-direct

2 BY MR. GAYNOR:

3 Q Mr. Klein, would you please tell the jury  
4 and the court how you went about examining these docu-  
5 ments and what you did?

6 A Actually I compared the two signatures to  
7 find whether the two signatures were written by the  
8 same person or not.

9 Q Please go ahead.

10 A Of course, one of the most important things  
11 is to find whether it is possible that there were  
12 two people involved instead of one, whether their  
13 handwriting on 291 was written by the same person as  
14 290. I went about to find differences in the two  
15 writings and I will now describe the differences between  
16 the two writings.

17 On Exhibit 290, the down stroke in the  
18 capital "D" --

19 Q Excuse me one moment just for purposes of  
20 identifying now. Do you have the originals there,  
21 the two documents?

22 A Yes.

23 Q Fine, okay. Go ahead, sir.

24 A The down stroke on the capital "D" is done  
25 with heavy pressure, and this is 290, while on Exhibit



1 hba7 Klein-direct

2 291 the down stroke is extremely light, so light that  
3 it in the copy is almost impossible to see, and even  
4 in the original the stroke down is extremely light.

5 No. 2, from "a" to "d" in the word "David"  
6 the letters are constantly ascending above the line,  
7 above the base line, while in 291, the letters "a" to  
8 "d" are descending, meaning going downward.

9 No. 3, the "v" in "David" is the same width  
10 as the letter "a", it measures three millimeters.  
11 The "v" and the "a" are different in Exhibit 291.  
12 They are respectively three and a half and two milli-  
13 meters.

14 No. 4, the "i" in "David" is rounded near  
15 the base line, forming a fluid connection to the letter  
16 "a." The "i" in "David" in Exhibit 291 is angular  
17 at the base line, indicating hesitation to go on, the  
18 rhythm is interrupted.

19 I want to point out here that those are  
20 the things we are really looking for in a forgery.  
21 When a person is copying one signature from another  
22 he cannot fluidly, continuously write, but he must stop  
23 in order to check whether he is doing the right thing.  
24 This point No. 4 is therefore a very strong point.

25 No. 5, distance between "David" and "Stirling"

hba8 Klein-direct

is nine millimeters in Exhibit 290. It is only five millimeters in Exhibit 291.

No. 6, distance between "S" and "t" is eight and a half millimeters in Exhibit 290. It is five millimeters in Exhibit 291.

The "i" in "Stirling" is rounded. The "i" in Exhibit 291 in the word "Stirling" is angular.

No. 8, the "r" in "Stirling" is rounded at the base line, it is angular in Exhibit 291. Again, this is a sign of hesitation, which means that the person has waited to see what he has to do next.

No. 9, the angle, or what we call the slant, in Exhibit 290 is 110 degrees. The angle in Exhibit 291 is 122 degrees.

The loop in "g" of "Stirling" is more rounded in Exhibit 290. It is clearly angular in Exhibit 291.

No. 11, the "g" in "Stirling" in Exhibit 291 is open. The "g" in Exhibit 291 is closed.

No. 12, the "g" is curved to the right, while in Exhibit 291 the "g" is curved to the left.

No. 13, the initial loop in "Jr.." starts above the middle zone. The "J," or the initial stroke in "Jr.," starts in the lower part of the middle zone



1 hba9 Klein-direct  
2 in Exhibit 291.

3 No. 14, the full extent of signature in  
4 290 is 80 millimeters. The full extent of the signa-  
5 ture in Exhibit 291 is 83 millimeters.

6 No. 15, the "t" bar is 18 millimeters in  
7 Exhibit 290, it is only five millimeters in Exhibit  
8 291, which indicates that the handwriting was done much  
9 slower in 291 than in 290.

10 Q Sir, can you, looking at both these docu-  
11 ments, see hesitation points on document 291?

12 A Yes, as I pointed out, the angularity in  
13 the base line, or let's say near the base line, would  
14 indicate that there are hesitation marks which also  
15 show under strong magnification in the heaviness of h  
16 the stroke.

17 Q Then you formed an opinion based upon your  
18 analysis and examination with respect to a comparison  
19 of documents 291 with 290, is that right?

20 A That is correct.  
21  
22  
23  
24  
25

T5B pm 1

hbs

Klein - direct

2

Q What is your opinion, sir?

3

A It is my opinion that Exhibit 291 is a forgery.

4

MR. GAYNOR: I have no further questions, your

5

Honor, at this time.

6

CROSS EXAMINARION

XX

7

BY MR. MACBETH:

8

Q Mr. Klein, you were reading from a document as

9

you were testifying, is that correct?

10

A Yes.

11

Q This is it?

12

A Yes.

13

Q May I have that?

14

A Sure.

15

Q What is this?

16

A This is my report.

17

MR. MACBETH: May we have this marked as a

18

Government's exhibit, your Honor?

19

(Government's Exhibit 1049 was marked for

20

identification.)

xx

21

MR. MACBETH: Government offers 1049.

22

MR. GAYNOR: No objection, your Honor.

23

(Government's Exhibit 1049 was received

24

in evidence.)

xx

25

Q Mr. Klein, you have identified of course,



1 dwa5

Harrison-direct

2 THE COURT: I'll give you three minutes.  
3 I don't know. Mr. MacDonald may not wake up at this  
4 early hour. I might entertain a motion to strike all  
5 his testimony. So far he has not said a relevant  
6 word.

7 MR. FELDSHUH: May I be heard on that,  
8 your Honor? Again I refer to the Dienstag memo.

9 THE COURT: Look, everybody knows we saw  
10 the movie. They are just nifty and everybody singing  
11 and most of them are black and all that. We know  
12 there were modules built. That is not an issue in  
13 the case.

14 MR. FELDSHUH: The issue is, according  
15 to the Dienstag memo, the requirement for repairs.  
16 Didn't you hear that Dienstag said a reserve of \$800,000  
17 must be set up for repairs? We want to show by this  
18 witness that the module, when it arrived on the site,  
19 there was a maintenance man there, and this talk about  
20 repairs by Dienstag was nonsense.

21 THE COURT: This witness doesn't prove  
22 it. I haven't the foggiest idea how much repairs  
23 cost after listening to him.

24 Look, three or four more minutes I'll give  
25 you but I called you to the side bar because if we are

T5A am 1

jps

A 434

Clayton - cross

3861

2 Q They also had a large number of meetings of  
3 people involved in sales efforts and things of that  
4 nature, is that correct?

5 A Correct, yes.

6 Q A number of all these people visited the plant  
7 from time to time?

8 A Many, many, yes.

9 Q Now, have you seen a film called "It Can Be  
10 Done"?

11 A Yes, I have.

12 Q Was that shown to the visitors to the plant?

13 A Yes, I showed it many times myself.

14 Q There are all sorts of people that came to the  
15 plant?

16 A That's right.

17 Q Did you also take the visitors down to see  
18 a jacking system at the plant?

19 A Yes, I did.

20 Q Was that a demonstration with a kind of  
21 Cape Canaveral system that would show the modules actually  
22 being raised up?

23 A Actually raised them up, yes.

24 Q Is it a fact that in much of the raising that  
25 was done by cranes rather than actually by jacks?



1 jpa 2 D. Stirling-direct

3331

2 A Yes, I am.

3 Q Do you have any children?

4 A Two.

5 Q How old are they?

6 A I have a daughter 18 years old and I have  
7 son 16.

8 Q Mr. Stirling, there came a time when you  
9 learned of the indictment in this case?

10 A Yes, I did.

11 Q Did you come back to the United States freely  
12 and voluntarily to answer these charges?

13 A Yes, I did.

14 Q Now, I'd like to go back now to about the  
15 year 1962 and ask you, did there come about that time when  
16 you settled in Avon, New York?

17 A Yes.

18 Q What kind of business were you in, sir?

19 A I was in the home building and apartment  
20 building business.

21 Q Is it a fair statement to say that you  
22 were actually building homes and apartments?

23 A Yes..

24 Q Were they of what's been referred to here  
25 as a method of stick building?

- 1 jpa 3 D. Stirling-direct
- 2 A Yes, they were.
- 3 Q Is that a conventional method of
- 4 building hosues from the foundation on up on the site?
- 5 A Yes, that's exactly what it is.
- 6 Q Who was in this business with you?
- 7 A My brother and my father.
- 8 Q How much capital did you have?
- 9 A We had very little capital.
- 10 Q How did the three families live?
- 11 A We all lived in one home in Avon.
- 12 Q All three families?
- 13 A Yes.
- 14 Q Did your brother live with you in that house
- 15 with his family?
- 16 A Yes.
- 17 Q How many children does Bill have?
- 18 A Four.
- 19 Q What is the highest grade of school you
- 20 reached?
- 21 A First year of high school.
- 22 Q How about Bill?
- 23 A I think he was about second year of high
- 24 school.
- 25 Q Would you please describe to the jury the



1 jpa 4 D. Stirling-direct

2 work that you, Bill and your father did at this time  
3 in the building business?

4 A Well, I primarily looked after acquiring  
5 of sites of land to build the buildings on. I had  
6 a lot to do with the design of the buildings. Also re-  
7 lated to the market analysis, market research of  
8 where to put buildings, and dealt with the mortgage  
9 brokers, etc., who did the financing for the buildings.

10 My brother was totally involved in the  
11 construction of the buildings, which I also worked in  
12 as well, and my father did the administration.

13 Q What do you mean by that?

14 A Well, he looked after the payrolls and the  
15 record-keeping, etc., the writing out of checks,  
16 etc., that type of administration.

17 Q Your father did not have, am I correct, a  
18 background in the building business prior to your entering  
19 there?

20 A No, he didn't. My father was a butcher.

21 Q Now, you mentioned the words "mortgage  
22 brokers," David. What is a mortgage broker?

23 A A mortgage broker or mortgage banker is a  
24 person who specializes in placing mortgages on build-  
25 ings, whetehr it be a single-family home or a multi-

jpalo

D. Stirling-direct

3939

newness in the business.

We went back -- after exhausting all efforts in that area we went to Harper Sibley and he provided us a bond to do that project, which we did and was very successful.

Q Now, what was Harper Sibley's background?

A Harper Sibley's background is in the field of finance in the Rochester area. He was the mortgage correspondent for Metropolitan Life and John Hancock. He was a director of Central Trust and he had an extensive experience in the field of finance.

Q Did he thereafter serve as a source of providing loans for your business?

A Yes, he did.

Q Also for providing lines of credit?

A Yes, he did.

Q Did he have anything to do with your obtaining your first large mortgage commitment with Metropolitan Life?

A Yes, he did.

Q Did he arrange other financings for you after that?

A Yes, we did many millions of dollars of financing through and with Harper Sibley.



1 jpa29

D. Stirling-direct

3454

2 Q Did you amass the people under your direction  
3 to do this?

4 A Yes.

5 Q You concentrated your efforts in the design  
6 and manufacture of these modules?

7 A Yes.

8 Q With respect to the financing of all of this  
9 that was taken care of by Mr. Sibley and Mr. Marshall,  
10 is that correct?

11 A That is right.

12 Q Now, directing your attention then to February  
13 29, 1960, what happened on that day?

14 A The first first module that we produced in  
15 the Stirling Cubit factory was installed in the  
16 Fairways.

17 Q What was the Fairways?

18 A The Fairways was another project we were  
19 building on a partnership basis with Harper Sibley.

20 Q Did you actually erect and install on those  
21 sites 223 town houses?

22 A Yes.

23 Q Was that the first one that anyone had  
24 ever done?

25 A To our knowledge.

jpa30

D. Stirling-direct

1959

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Q That was where?

A That was in Henrietta, New York, which happened to be very close to the factory, within about eight miles.

Q What happened after that when that installation occurred? Was there attendant publicity?

A Yes, there was a fair amount of publicity.

Q Tell us what happened?

A A great many people came to us. It was a very new and exciting idea, and they came to us and wanted -- they had many offers of investment participation.

Q Would you focus on that, please, and tell us what happened?

A Well, different investors, people would come and ask if we were considering investment. We also had -- I am talking about private people. We also had professional people -- we had people from Wall Street come to us.

Q Would they be Wall Street underwriters?

A Yes. We had an offer of going public then in the spring of '68.

Q Now, Did Mr. Sibley handle these underwriters who were coming to you?



T5 pm 1

mcs 34 .

D. Stirling - direct

Sibley

2

Q Let me see if I can pinpoint this to move

3

along the questions here for you.

4

Was Stirling Homex Corporation then incorporated?

5

A Yes, it was.

6

Q Did you and your brother get transferred to

7

that company now all of the land and other assets that

8

were owned by you and Stirling Kubit?

9

A That is correct, that is right, and the system

10

and the patents were held on the system.

11

Q Pardon me?

12

A And the patents on the Kubit system.

13

Q And the factory and equipment and inventory

14

from Kubit and your other entities were all put into

15

Stirling Homex; is that right?

16

A That is right. We put in all of the assets

17

of Kubit and the system equipment itself, the land, the

18

building that it was on and we also put in all of our

19

buildings, land, both the land that we owned privately,

20

the Stirlings, and the land that we owned on a partnership

21

basis with Sibley.

22

We didn't put in any developments.

23

Q Now, in return for that did you receive shares

24

of stock from the Stirling Homex Corporation?

25

A That is true.

1 cs2 35 D. Stirling - direct 2:46:4

2 Q And that was you and your brother Bill?

3 A And my father.

4 Q What was the total value, the best you can give  
5 us, of all of this property, land, inventory, factory,  
6 everything in Kubit; how much was it worth, approximately?

7 A It was worth several million dollars.

8 Q Then thereafter Stirling Homex is a going  
9 corporation; right?

10 A Yes.

11 Q What business was it in?

12 A Stirling Homex then was in the business of  
13 producing modules and installing them and designing and  
14 creating total residential developments for sale to  
15 customers, either in the total package or in any parcel  
16 of it, any segment of it.

17 Q Did there come a time when you did a project  
18 at Rochester in the inner City of Rochester? When I say  
19 you, now, I mean Stirling Homex Corporation.

20 A Yes.

21 Q Will you please describe that for his Honor  
22 and the jury?

23 A Harper, who had been the Commissioner of Public  
24 Safety in --

25 Q Where?



csll 44

D. Stirling - direct

1976

board member, Jack Doerge, Gail Konen and Teddy Kheel was brought on the board also by Harper.

Q Is that Harper Sibley?

A Yes.

Q And the Central Trust was the prime banker?

A They were the prime banker up through 1969, the winter of 1969.

Q And Harris, Kerr, Forster were the accountants?

A Yes.

Q And the attorneys were who?

A When Homex was created the two investment bankers wanted Alan Kramer of New York to be the attorney.

Q Who was he?

A He was an SEC attorney from a law firm in New York.

Q Did you follow that advice and retain him then?

A Yes, we did.

Q Did he continue on, by the way throughout the days of Stirling Homex?

A Yes, he continued right through to -- he was still the attorney for Homex when we left.

Q Lest I forget, can you tell his Honor and the jury the total amount of fees that Stirling Homex paid Alan Kramer for his advice to the company?

1 csl2 45 D. Stirling - direct

2 A Many thousands of dollars. I think it must be  
3 up around \$180,000, \$200,000 at least.

4 Q Moving on a little, during all this period I  
5 take it that you and Bill dedicated yourselves to the  
6 design of the factory?

7 A That is right.

8 Q What was the policy of the Stirling Homex  
9 board of directors with respect to the corporation's  
10 business and your other interests and Bill's?

11 A From the very beginning when the private place-  
12 ment took place they were very adamant that we not be in  
13 the property business, the property business of being in  
14 the business of owning income-producing property the  
15 way the Stirlings and Sibley had been before, and they  
16 wanted the company only to sell its product rather than  
17 to hold it and take the profit over a period of, say, 20,  
18 30 years. That was a policy and we agreed to that.

19 Q Is it fair to say, if I may capsule this,  
20 that they wanted you to divest yourself of all of your  
21 prior mode of doing business that is, operating income-  
22 producing properties and concentrate on the building of  
23 Homex modules?

24 A Yes.

25 Q As a result of that did you begin to sell off



1 ps5 D. Stirling - direct 3988

2 A Yes, Mr. Kramer.

3 Q We talked about him I believe, yesterday?

4 A Yes.

5 Q He was a specialist in SEC --

6 THE COURT: Mr. Gaynor, you must stop that

7 over and over repetition. Let's proceed.

8 Q Did the board of directors have an executive

9 committee?

10 A Yes, it did.

11 Q What was that and what did it do?

12 A It was the committee headed by Harper Sibley

13 that made the day-to-day decisions of the company.

14 Q Was Mr. Marshall of Central Trust on it?

15 A I don't recall.

16 Q Now, this executive committee, were they

17 experienced in financial affairs?

18 A Yes.

19 Q Were you and bill sophisticated, or did you

20 know about financial affairs of this magnitude?

21 A No, we did not.

22 Q Now was it about this time that the board of

23 directors decided on a new comptroller?

24 A Yes.

25 Q Who became comptroller?

jpa6

D. Stirling-direct

4082

up with the Fairways from Harper.

We also sold him the piece of land which was a very small transaction, the one you had on your board there marked F.

Q Now, I want to come to that.

Just prior to F, the part I drew on the board over there comprised a number of parcels within that blackboard, in that perimeter?

A Yes.

Q There was E and P?

A Yes.

Q And there was A and M, correct?

A Yes.

Q And there was F?

A Yes.

Q Now, you sold him E and P, isn't that true?

A Yes.

Q And that was pre or before Homex?

A No. I think that Homex was in existence and it was a private company. It was not a public company when the Stirlings sold him their section, E, and Homex, which then owned the next section which had been the Stirlings', sold him that.

Q Now, it was Peter Thun's interest, wasn't



1 jpa7 D. Stirling-direct

2 it, to view the whole Hollyrood Park as a whole,  
3 isn't that true?

4 A Yes.

5 Q As a matter of fact, he was also concerned  
6 and interested in M and A, was he not?

7 A Well, he was going in on a large investment  
8 there and he was interested as any astute person  
9 would be in everything surrounding Hollyrood Park.

10 Q So at the time you sold E and P he was very  
11 much interested in F and M, isn't that true?

12 A Well, the fact that it was conditional on the  
13 contract it was a condition in the contract that he have  
14 an option.

15 Q So that F was not some sort of an after-  
16 thought a year later or so, was it?

17 A No. In fact, it was an absolute condition  
18 of the contract. If he hadn't of had the option on  
19 F and M he wouldn't have purchased E and P.

20 Q That would have been natural for a purchaser  
21 because he would want to know, investing \$7 million  
22 in E and P, as to who might buy F and M, isn't that true?

23 A That is correct.

24 Q So therefore an option was given to Peter  
25 Thun with respect to F and M, isn't that true?

1 jpa3 D. Stirling-direct

2 A That is correct.

3 Q Am I correct in saying that an option  
4 is a right to buy, in this case a particular piece of  
5 land?

6 A That is right, under certain conditions.

7 Q If he paid the price and various other  
8 things?

9 A That's right.

10 Q Therefore, when E and F were in Mr. Thun's  
11 hands previously the time now came to decide what was  
12 to happen with M and F, isn't that true?

13 A That's true.

14 Q You advised, in accordance with that option,  
15 Mr. Thun, what do you wish to do with F and M?

16 MR. MAC DONALD: I ask that the form of  
17 the question be changed to nonleading and we get to the  
18 direct conversation.

19 THE COURT: You have done a lot of leading,  
20 Mr. Gaynor, without objection and I think that's all  
21 right. But I suppose at this point you should not  
22 lead.

23 MR. GAYNOR: I was trying to shorten it  
24 but I will try to refrain from doing that. I apologize.  
25 I withdraw that question.



1 jpas6

Stirling - cross

2 the same?

3 A 105 and 103 --

4 Q 115, I'm sorry. I put a paper clip at the top  
5 of the page.

6 A There it is. They look very similar, the  
7 front page.

8 Q That squares with your memory, does it not,  
9 that it was in June of '69 and not June '68 that the labor  
10 pact was arrived at in time and isn't that why you were  
11 puzzled this morning when you saw the '68 date because you  
12 thought that it was maybe out of date or out of place?

13 A I wasn't puzzled this morning. I couldn't  
14 read the date in here, that's all. I still don't know what  
15 your question is.

16 Q In June of 1969 there was a labor breakthrough  
17 and Homex issued in October of '69, at least, that press  
18 release and perhaps not October '68 as I originally thought  
19 based upon 103.

20 A I don't recall the exact date. There was such  
21 a contract.

22 Q I would like to hand you Government's Exhibit 101  
23 and Government's Exhibit 102. With respect to Government's  
24 Exhibit 102, you admit that is a genuine signature of David  
25 Stirling, Jr.?

cs9

D. Stirling - cross

1  
2 You had three sections to that question and  
3 one of them I don't want to leave hanging. One was, as  
4 I understood your phrasing of it, that I induced or talked  
5 to labor officials into participating in the stock, and I  
6 want that to be very clear, that I did not at any time.

7 Q I would like to direct your attention, sir, to  
8 a meeting with Mr. Ruggiano in the hallway with yourself  
9 and your brother and ask you if it is not the fact that  
10 you said to him, in substance, if not words, "That the  
11 stock was going to be a good thing and go up and that he  
12 ought to buy in," and he said in response he didn't  
13 know if he could; he didn't know if it was legal.

14 Did you have that conversation with Mr.  
15 Ruggiano?

16 A I don't recall that conversation exactly like  
17 that. I don't know that I recall it exactly at all.  
18 I think there was a question of Mr. Ruggiano that he wanted  
19 to buy stock. We had inquires, hundreds of inquiries  
20 of people who wanted to buy stock.

21 Q Mr. Stirling, I'm going to ask you --

22 MR. GAYNOR: May he finish his answer, please?

23 MR. MacDONALD: I am going to ask him not to  
24 generalize.

25 THE COURT: His answer is going beyond the



mcs

D. Stirling - cross

1                   A       Again, I don't know what you mean by discussing  
2 his buying stock.       That leaves a big question to me.  
3  
4       At the time --

5                   Q       His obtaining stock.

6                   A       His obtaining stock or anything else to do  
7 with the stock.       Again, I repeat, there was many people  
8 who asked us at the time.       It was one of the horrors of  
9 the whole underwriting.       Everyone wanted stock.       It was  
10 impossible to deal with, and he may have asked me for stock,  
11 but he may not have.       I certainly didn't ask him did he  
12 want to buy stock in the hallway or anywhere else.

13                  Q       It is the fact, is it not, that you through  
14 Mr. Csapo and, in turn, Mr. Saperstein made the same  
15 substantial offer to Mitch, Jacobs and Conger in Ohio in  
16 the fall of 1969?

17                  A       That is not true.       I never made any offer  
18 through Mr. Csapo or anyone else, substantial or otherwise.

19                  Q       One final question as to Mr. Ruggiano.

20                         While hundreds of people may have been asking  
21 to get in on the hot issue, not that many were telling you  
22 that it was lawful or unlawful for them to be permitted  
23 in on the list; is that correct?

24                  A       We didn't, --

25                         MR. FELDSHUH: I will object to the form of that

1 jpal4 Stirling-cross

2 here in New York?

3 A No, I don't say it was he and I or who it  
4 was. I had information from Mr. Kramer that there  
5 was nothing wrong with any labor officials buying stock  
6 the same way as anyone else. He did say that if  
7 there was anything wrong at all it was in appearance  
8 only.

9 We also had that information very strongly  
10 from Mr. Ted Kheel who was our labor expert and  
11 director of the company and who directed several  
12 labor people onto the stock purchase. That was the  
13 source of our information.

14 Q Can you tell the jury, first of all, if  
15 that is hearsay information or whether you got it directly  
16 face to face from either of those men?

17 A I don't know what you mean by hearsay.  
18 Whether they told me on the telephone or they told me  
19 directly face to face, it could have been either way.

20 Q But it was you and them and not through  
21 Mr. Yanowitch or some other third person?

22 A It could have been both ways. I know in  
23 Mr. Kheel's instance it most certainly was direct.

24 Q Tell the jury your best recollection of  
25 what you told Mr. Kheel about how Mr. Ruggiano, and the



1 jpal5 Stirling-cross

2 people through him, Campbell, Livingston, obtained stock;  
3 what did you tell him about those placements?

4 A First of all, there weren't any placements.  
5 I don't know that I ever discussed Ruggiano or anyone  
6 else in that context with Mr. Kheel.

7 Q Let's go then to the Ohioans, Marsh,  
8 Jacobs and Konyha, tell the ladies and gentlemen of the  
9 jury what, if anything, you remember telling Mr. Kheel  
10 about how they were to be admitted to the list.

11 A I don't think there was a question of how they  
12 were going to be admitted to the list. They asked to be  
13 on the list and they were on the list, as were hundreds  
14 of other people.

15 Q Tell the members of the jury about  
16 what you told Mr. Kheel about who they asked to  
17 get on the list.

18 A I don't know if I ever told how they got  
19 on the list.

20 THE COURT: Could I interrupt? Let me  
21 ask, Mr. Stirling, what facts you gave to Mr. Kheel  
22 about stock and labor people that led to the advice you  
23 say he gave you. Because he got the facts from you  
24 or somebody in your company.

25 THE WITNESS: He not only got the facts

1 jpal6 Stirling-cross

2 from me. Mr. Kheel, first of all, put several  
3 people's -- asked for their names to be admitted on the  
4 list.

5 THE COURT: I am not asking you that.  
6 What fact did you give him about labor people that led  
7 him to give you the advice that the situation was per-  
8 fectly all right?

9 THE WITNESS: Well, I believe I have  
10 to tell you what I was starting to tell you, of how,  
11 first of all, Mr. Kheel was totally aware of all of  
12 our labor relations and all of our contracts. And  
13 going back to Mr. Kheel putting people or asking people  
14 to go on the list, they were labor people that he asked  
15 to go on the list. That's how the question ever  
16 came up.

17 THE COURT: Because he wanted to put  
18 labor people on the list?

19 THE WITNESS: And did put labor people  
20 on the list. Does that answer your question?

21 Q Well, I would like to ask one more about  
22 Mr. Mitchell, Mr. Marsh -- Mr. Konyha, Mr. Marsh and Mr.  
23 Jacobs.

24 I hand you Government's No. 569 in evidence.  
25 My question is: it is a fact, is it not, that you



1 jpa20 Stirling-cross

2 Mr. Frank Csapo to make substantially that proposition  
3 to him, to Ruggiano?

4 A That is not so.

5 Q More broadly, it is the fact, is it not,  
6 that you did pick up the phone and call the Central  
7 Trust Company, Charles Marshall, and request that he  
8 make a loan to several individuals through Pressprich  
9 & Company so that they could buy stock in the offering?

10 A Who are the several individuals?

11 Q Well, let's start with Ruggiano, Campbell,  
12 Livingston, Marsh, Kohyha and Jacobs.

13 A That is not so.

14 Q How about Mr. Lamb, Mr. LaPlante, Celli,  
15 Legg, Wood or Gunsally?

16 A No, that is not so.

17 Q I hand you Government's Exhibit 866 in  
18 evidence --

19 MR. GAYNOR: I object to that on the  
20 same grounds as I stated at the side bar. Your  
21 Honor invited my --

22 THE COURT: But with respect to  
23 things in evidence, I am overruling that objection.

24 MR. GAYNOR: May I have that number,  
25 please?

1 jpa21

Stirling-cross

2 MR. MAC DONALD: 866.

3 Q Whose secretary was Sue Flaherty?

4 A My brother's.

5 Q I would like to show you one of the  
6 earlier documents in the back of this. Did you  
7 arrange for Central Trust Company any loans for any of  
8 the individuals listed thereon to purchase stock in the  
9 Pressprich underwriting?

10 A Just on the one page?

11 Q I think it carries over to the page behind  
12 it with a few more names.

13 A Am I to look at both pages then?

14 Q Yes, sir.

15 A There were two people that I did ask Mr.  
16 Marshall. Not arrange a loan, I asked them if they  
17 wanted to make a loan. But I don't see their names  
18 here.

19 Q What's your best recollection of those two  
20 names?

21 A I'm trying to think of it. One was --

22 Q Joseph Miller?

23 A That's it,

24 Q Clayton Moore?

25 A Yes, two attorneys. They were attorneys



A 456

jpa22

Stirling-cross

of ours in Akron, Ohio.

Q Have you kept your finger on the page of that special list. I would like to ask preliminarily if that's your handwriting for the word "Direct" next to the name Mr. Peter Terzik, around the 200 box on the right-hand side.

A I don't recognize it.

Q Joseph Lune Kirklund appears in the sum of \$58,300 as the bottom entry on that list?

A Yes.

Q Would you admit or deny whether or not he was to receive a loan through the Central Trust Company through your efforts?

A Joseph Lune Kirklund was put on the list by Theodore Kheel. I believe that Ted Kheel spoke to Central Trust, to Charlie Marshall particularly. I remember he discussed that with him, that he -- he knew Charlie Marshall very well, a lot longer than I did.

Q That's hearsay information?

A That is hearsay information. But he was on the list and he was one of the people that Ted Kheel had asked to be on that list.

Q Now, with respect to Joseph Miller and Robert Blakemore, did you tell Mr. Marshall that you

1 jpa23

Stirling-cross

2 would he willing to make any guarantees?

3 A No, I did not, nor was I asked it.

4 Q I take it your testimony is, and I think  
5 I am obligated to ask you, or entitled, that you did  
6 not --

7 MR. GAYNOR: I move to strike what he  
8 is entitled to or obligated.

9 MR. MAC DONALD: Withdrawn. I'll start  
10 over.

11 Q Do you deny asking Mr. Marshall to, under  
12 your line of credit and subject to your guarantee,  
13 make loans to the seven labor leaders, Ruggiano, Marsh,  
14 Livingston, Campbell, Konyha and Jacobs?

15 A I absolutely deny it.

16 Q That includes Mr. Kirklund as well, does  
17 it not?

18 A Yes, it does.

19 Q I will show you this page of the special  
20 stock list file and ask you if it is a loan by Lune  
21 Kirklund Company together with a Battle, Fowler envelope  
22 addressed to you personal and confidential?

23 A Where is the envelope?

24 Q It is a Xerox copy of an envelope and a note  
25 with a notation on the bottom about where the original



1 jpa29 Stirling-cross

2 rect?

3 A No, I wouldn't say that's a fair statement.

4 I don't think anyone limited Central Trust  
5 to anything, nor could they.

6 Q I have handed you Government's 291 in  
7 evidence, that is the letter which Mr. Klein testified  
8 about last Friday, is it not?

9 A That's true.

10 Q That lists eight men and eight sums of  
11 money and I take it, first of all -- withdrawn.

12 Will you admit or deny whether that signa-  
13 is genuinely yours?

14 A I absolutely deny it.

15 Q Who in addition to Mr. Yanowitch had you  
16 authorized to sign your name during the years 1968 to  
17 1972.

18 MR. FELDSHUH: Objection, your Honor.  
19 I don't know of any authority that's in evidence that Mr.  
20 Stirling authorized Mr. Yanowitch to sign Mr. Stirling's  
21 name.

22 THE COURT: Yes. I know what you said  
23 said about this prospectus but you better lay a founda-  
24 tion.

25 Q Did you authorize Mr. Yanowitch to sign

1 jpa3

D. Stirling-cross

2 Yanowitch.

3 Q Isn't it a fact that at least on February  
4 16, 1971 you and your brother had directed Mr.  
5 Yanowitch to clear all information requests in connection  
6 with the Merrill Lynch underwriting review with you  
7 prior to disseminating information that they were soli-  
8 citing?

9 A I don't recall that at all. I don't re-  
10 call it.

11 Q I would now like to direct your attention,  
12 sir, to the topic that we were on before breaking  
13 for the recess. I would ask if it is not the fact  
14 that on or about November 11, 1971 you caused William  
15 A. Shea to pay and deliver a thing of value to Samuel  
16 Ruggiano, the thing being a \$200,000 promissory  
17 note to the Central Trust Company for Samuel Ruggiano's  
18 loan account, and that you agreed personally to  
19 hold Mr. Shea harmless and indemnify him against loss  
20 in that connection.

21 MR. GAYNOR: I have two objections, your  
22 Honor. One is it is two questions in one, and the  
23 second, it calls for a conclusion. It is a statement  
24 made in the form of a question.

25 THE COURT: Come to the side bar.



1 jpa4

D. Stirling-cross

2 THE COURT: What are you reading from,  
3 a transcript?

4 MR. MAC DONALD: No. My notes in an  
5 effort to make intelligible some rather prolix --

6 THE COURT: Where is the transcript of  
7 the plea?

8 MR. MAC DONALD: It says, "Are you guilty  
9 of count 17?"

10 THE COURT: I think what you better do  
11 is show him the transcript of the plea and show him  
12 this and then you may ask him the question, just to  
13 assist his recollection. You show him certain  
14 documents marked for identification and then you may  
15 put the question that way.

16 (In open court.)

17 BY MR. MAC DONALD:

18 Q Mr. Stirling, I'm handing you Government's  
19 1576 for identification and I have opened it to page 11  
20 and, in addition, I'm handing you Government's Exhibit  
21 577 for identification, opened to page 2, and 778 for  
22 identification, also opened to page 2.

23 I would like to read those pages to yourself  
24 and then I will put a question to you.

25 (Pause.)



1 jpa5

D. Stirling-cross

2 Q Have you finished reading all three of the  
3 pages I directed your attention to?

4 A I didn't finish readinf this one.

5 (Pause.

6 A Yes, I have read them.

7 Q The question is, isn't it the fact that  
8 on or about November 11, 1971 you caused William A.  
9 Shea to pay and deliver to Samuel Ruggiano a thing of  
10 value, that is, a \$200,000 promissory note to the Cen-  
11 tral Trust Company for Mr. Ruggiano's loan account,  
12 and in connection therewith you promised to indemnify  
13 and guarantee Mr. Shea against loss?

14 A On or about November the 11th -- what year  
15 is it? '71?

16 Q Mr. Stirling, if you are able to answer  
17 that question yes or no I would appreciate your trying.

18 A It is a little difficult to answer it just  
19 yes or no.

20 THE COURT: Let him repeat it and then  
21 I think you better answer it yes or no or tell us why  
22 you can't answer it yes or no.

23 Let the reporter repeat the question.

24 (Record read.)

25 A Do you want me to explain my answer?



1 jpa6 D. Stirling-cross

2 THE COURT: Yes.

3 A At that time, November 11, 1971, I did agree  
4 to indemnify William Shea's loan that he was taking  
5 out at Central Trust Company, which was done at that  
6 time to straighten out a mess, a series of mistakes  
7 that had been made at Central Trust Company. That's  
8 what I did on November the 11th.

9 THE COURT: So your answer to this ques-  
10 tion is no?

11 THE WITNESS: ~~At~~ that moment that was  
12 the answer to that question.

13 THE COURT: Well, you said on or about,  
14 and you didn't say at that loan. Would the answer  
15 to the question be yes if the date was some other date?

16 THE WITNESS: I would say I replied yes  
17 to that one on another date.

18 MR. MAC DONALD: May I have the last part  
19 of the answer --

20 THE WITNESS: I said I did reply yes to  
21 that type of a question at a much later date than the  
22 November 11, '71 date.

23 Q I would like to direct your attention to  
24 the Exhibit 576 in your hand, page 13. I ask you  
25 to read it to yourself, that page.

1 jpa7

D. Stirling-cross

2 A What would you like me to do?

3 Q I would like you to read page 13 to your-  
4 self.

5 (Pause.)

6 MR. GAYNOR: Your Honor, may I approach  
7 the side bar in furtherance of what we discussed the  
8 last time?

9 THE COURT: All right. While the witness  
10 is reading you may do that.

11 (At the side bar.)

12 MR. GAYNOR: I think in view of the wit-  
13 ness' last answer that ought to end this line of ques-  
14 tioning and this colloquy. I think --

15 THE COURT: What's this page 13, another  
16 count?

17 MR. MAC DONALD: This is Mr. Jacobs and  
18 Mr. Marsh. There were only three men involved in  
19 his admission. And I don't understand his last answer,  
20 (a), at all, and (b), to have established a factual  
21 basis for cutting off a line for two other questions  
22 with respect to which we have admissions and maybe he'll  
23 answer them.

24 THE COURT: Why don't you ask him if his  
25 answers would be the same if the question had substituted



1 jpa8

D. Stirling-cross

2 for it the name Ruggiano the name Jacobs and the name  
3 Marsh, all right?

4 MR. GAYNOR: Are we going to cease there?

5 THE COURT: I don't know. Are you  
6 going to stop at that point?

7 MR. MAC DONALD: I intend to find out  
8 what the mess was he referred to.

9 MR. GAYNOR: I respectfully suggest we  
10 have gone into this far enough. It is highly prejudi-  
11 cial and going back over matters that he pled guilty  
12 to and was punished for it. If it goes further I  
13 will move for a mistrial.

14 THE COURT: You can move now.

15 MR. GAYNOR: I so move.

16 THE COURT: The government is allowed  
17 to pursue that. I don't know what he is talking about  
18 here and I'm not going to leave it here. I know you  
19 must have become aware of this at the time you pre-  
20 pared him. There will be a lot more mistrials if  
21 leave things in this posture.

22 MR. GAYNOR: I take exception to your  
23 Honor's suggestion that I prepared him.

24 THE COURT: You have no basis for an objec-  
25 tion. This is something which any trial judge is  
entitled to assume he was prepared on a subject that

1 jpa9

D. Stirling-cross

2 we had so much discussion about. If you are now  
3 standing there telling me you have not prepared him  
4 on this I am a sonished that you would admit it.

5 MR. GAYNOR: I object to the word "pre-  
6 pared." I have gone into the facts --

7 THE COURT: That's what I mean by prepared,  
8 Mr. Gaynor.

9 (In open court.)

10 Q Mr. Stirling, would you answer to the ques-  
11 tion that I put a moment ago that you answered with  
12 respect to Mr. Ruggiano be the same if I were to sub-  
13 stitute the name Elmer E. Jacobs?

14 A It was the same situation.

15 Q And finally, would your answer be the same  
16 if I were to substitute the name Milan Marsh?

17 A It would be the exact same situation.

18 Q I would like to direct your attention to  
19 Government's Exhibit 577 before you. Did you locate  
20 that one?

21 A Yes.

22 Q My question is, isn't it the fact that on  
23 January 21, 1976 you admitted to having, in the case  
24 of Mr. Ruggiano, caused Mr. Shea to deliver a thing  
25 of value, the \$200,000 promissory note, to the Central



1 jpal0 D. Stirling-cross

2 Trust Company for his loan account and to have guaranteed Mr.  
3 Shea against loss in that regard?

4 A Yes, I admitted that a few minutes ago,  
5 that I did say yes to that at some time later.

6 Q You also admitted on that same occasion,  
7 January 21, 1976, having delivered things of value or  
8 caused the delivery of things of value in the case of  
9 Elmer Jacobs and Milan Marsh, as well?

10 A Yes, I did.

11 Q Government's Exhibit 290 is signed by you  
12 and your brother, is it not?

13 A That is true.

14 Q Those signatures are genuine?

15 A Yes, they are.

16 Q It is a letter, is it not, to Mr. William  
17 A. Shea dated November 18, 1971?

18 A Yes, it is.

19 Q You state in the second paragraph of that  
20 letter:

21 "At our request you have also purchased  
22 5700 shares of common stock of Stirling Homex Corpora-  
23 tion which have been pledged as collateral security  
24 for your obligation to Central Trust Company?

25 A Yes, it says that.

jpall

D. Stirling-cross

2           Q       And it is the fact, is it not, that you  
3 arranged Mr. Shea's purchasing those 5700 shares with  
4 the knowledge that Mr. Ruggiano, Mr. Jacobs and Mr.  
5 Marsh were the owners of those shares to the extent  
6 that they make up a portion of the 5700?

7           A       No, I arranged this with the knowledge that  
8 Central Trust was holding 5700 shares of stock,  
9 most of which they didn't have buyers for.     They were  
10 holding it in street names.     They had loans that  
11 didn't have a home and they were in quite a bit of  
12 trouble with it. Both Mr. Marshall and other members  
13 of Central Trust asked us, as they did with some of  
14 the other documents you have shown here today that  
15 were attached to other ones, asked us many times, to  
16 assist them in extricating themselves from this mess.

17           Q       Now, you referred to some loans that didn't  
18 have a home.     It is the fact, is it not, Mr. Stirling,  
19 that on or before November 18, 1971 you knew that at  
20 least three of those loans were Ruggiano, Marsh and  
21 Jacobs and that they were connected with the Brotherhood  
22 of Carpenters and Joiners, right?

23           A       I certainly knew who they were connected  
24 with and I knew about this time, or a few months before,  
25 that there was a great deal of problems at Central Trust



jpal2

over these loans and other loans.

Q When you asked Mr. Shea to pay or to give a note in the sum of \$200,621.50 you also knew that was considerably more than what those shares could be sold for at that time, correct?

A Yes, I knew it was more than what the shares could be sold for at that time, but me and Mr. Shea expected the stock to go up.

Q You knew, did you not, that -- withdrawn. Do you claim to have told Mr. Shea that any one of those 5700 shares was owned by a member of the Brotherhood of Carpenters and Joiners?

A I don't know that I had any conversation with Mr. Shea about the matter at all.

Q Who did you deal with in connection with the obtaining of this or the preparation and signing of this letter. Just identify the person, please.

A Mr. Yanowitch.

Q Mr. Yanowitch only?

A I certainly discussed it with Charlie Marshall. He was pressing us very hard to do something about this.

Q Any additional people?

A I don't recall. There could be -- it certainly wasn't a secretive matter. It was a loan

cs3

1  
2 Go ahead.

3 MR. GAYNOR: I think that is useless.

4 THE COURT: I don't want to truncate your  
5 record.

6 MR. GAYNOR: No. Your Honor knows what I am  
7 going to say. That is essentially it. He has come  
8 a long way.

9 THE COURT: I had in mind that in its benighted  
10 way the Court of Appeals occasionally differs with me and  
11 you might want to preserve your rights.

12 MR. GAYNOR: All right, your Honor.

13 I will make the following offer of proof:

14 I want to put the witness Dan Wind on the  
15 stand. He is an independent civil engineer from the  
16 State of Israel and from about January of 1972 until June  
17 29 he was here on two occasions negotiating on behalf of  
18 the State of Israel with other ministers of the State of  
19 Israel to purchase modules from Stirling Homex Corporation  
20 for shipment to Israel immediately, approximately 500  
21 modules totaling approximately \$2-1/2 million. He visited  
22 the plant. He was up there from June 27 to June 29.

23 The actual produced modules in the storage  
24 area were shown to him. He also saw completed projects  
25 of Homex in Ithaca, which immediately comes to my mind,



1 cs4

2 and he was ready, willing and able to negotiate the final  
3 price for that shipment. A shipment had been arranged  
4 to ship them back, and on June 29, just before the com-  
5 pletion of that situation, the events of June 29 with  
6 respect to the corporation ceasing to exist, as your Honor  
7 knows, took place.

8 I offer it on the basis of the fact that the  
9 Government introduced evidence from Mr. Dienstag, testimony  
10 and indeed his memorandum which sought to create the  
11 facts and the impression that there were few if any  
12 viable projects in the works at that time, and I think  
13 the jury had received that impression, and I offer Mr.  
14 Wind to rebut that evidence by showing that this was a  
15 viable one.

16 MR. FELDSHUH: I have one application.

17 THE COURT: Okay.

18 MR. FELDSHUH: I have one application, unless  
19 your Honor wishes to make a statement in response to to  
20 Mr. Gaynor's statement.

21 THE COURT: No, his restatement was in  
22 response to and refutation of me.

23 MR. FELDSHUH: My application is this, your  
24 Honor:

25 I take it that Mr. Gaynor will rest at this

cs6

Yanowitch - direct

4458

1  
2 your talks with Dr. Shapiro at any time told him that  
3 you would guarantee him against loss; did you say that in  
4 words or substance?

5 A Absolutely not.

6 Q Did you at any time in your discussions with  
7 Cesare Falcone say to him, in words or substance that you  
8 would guarantee him against loss?

9 A Absolutely not.

10 Q With regard to Mr. Barbato, in any conversation  
11 that you had with him did you ever say to him, in words  
12 or substance, that you would guarantee him against any  
13 loss?

14 A Absolutely not.

15 Q Did Mr. Jerry Feinglass go into this transaction  
16 as a partner?

17 A Jack Feinglass?

18 Q Jack Feinglass?

19 A No, he withdrew.

20 Q In addition to that, did you have occasion to  
21 discuss with Mr. Beckerman any talks with respect to  
22 indemnifying Cesar Falcone or Shapiro or Barbato with  
23 regard to any loss they may sustain from this property?

24 A I got a call from either Beckerman or Garrity  
25 shortly after I got out to Stirling Homex and Beckerman



1           lha                           Yanowitch-direct           4496  
2           regard to the establishment of the legal department  
3           of Stirling Homex, you took on a number of attorneys,  
4           did you not?  
5           A           When I first went out there I was the only  
6           attorney in-house, and in a short period of time,  
7           because we were growing so quickly and because we were  
8           going into areas that one attorney just couldn't  
9           possibly handel the work load, we started to expand  
10          the legal staff.

11          Q           Did you then take on attorneys who had  
12          background experience in dealing with federal housing  
13          authorities?

14          A           Yes.       We tried to -- each attorney that  
15          came on board, we tried to find the best expert in  
16          that particular field that would move to add on  
17          and work with us and have close association in the  
18          plant.

19          Q           As a consequence of this effort to estab-  
20          lish a legal department to take care of the expanding  
21          affairs of Homex, Judge Davis, Judge Trammell, Thomas  
22          Santa Lucia, Jerome Dienstag, Robert Agnello, Charles  
23          Northrup became associated as counsel in that legal  
24          department, isn't that right?

25          A           There were others.       Yes.

jps

4639

in advance and knowing you and your experience I'm sure that you advisedly chose not to do that.

So, I will allow cross-examination on the McCann episode.

I will not allow cross-examination on the general subject of the appearance of the union officers on the stock purchase. I think it is a matter of discretion that the defendant is permitted to refrain from taking the stand on a separate substantive item in a case of that nature without exposing himself to Government inquiry on such a subject.

Don't wince when I rule, Mr. MacDonald. I rule whichever I rule and these facial expressions just make the job less pleasant. They don't win any points for you.

Now, what was the next one?

MR. FELDSHUH: It was the Booth situation.

THE COURT: Booth is in the same category as the McCann episode, and I will allow, obviously, cross-examination about that. It is a very serious claim here of the attempted subornation of perjury related to that. It is a troublesome jury question. I will not allow the defendant, who is alleged to have been directly involved in that kind of concealment activity, to be insulated from



1 THE COURT: Any other defense counsel have  
2 questions?

3 MR. FELDSHUK: No questions.

4 MR. GAYNOR: No questions, your Honor.

5 MR. PATTERSON: No questions, your Honor.

6 THE COURT: All right. Cross-examine.

7  
8 CROSS EXAMINATION

9 BY MR. MacDONALD:

10 Q Mr. Woods, was there a condition to the  
11 immunity understanding which was referred to by Mr. Eaton  
12 when you were testifying before the grand jury?

13 A Oh, yes.

14 Q Was it your understanding that the only  
15 limitation on the immunity that you had then received was  
16 that it was expressly conditioned on truthfulness and any  
17 wilfully false statements to the grand jury during the  
18 course of your testimony would be a sufficient ground to  
19 vitiate it altogether?

20 A That's correct.

21 Q With respect to your testimony here today under  
22 oath, do you have any understanding that you would not  
23 be prosecuted for perjury if you were to give a false  
24 statement?

25 A Yes, I know I would be -- I would be, you know,



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A No, I have never done any SEC work.

Q During the course of the career that you have just described, other than the two public offices that you mentioned, have you sought any other public office?

A Yes, I was the Republican nominee for governor of Mississippi in 1963 and again in 1967.

Q Were those campaigns successful?

A No, sir, they were not successful.

Q You were defeated?

Q Yes, sir.

Q Prior to taking the stand today, Mr. Phillips, can you tell us how many times you have given testimony about your association with Stirling Homex?

A Yes, sir. I testified before -- I appeared and testified before the Securities and Exchange Commission in September and November of 1972, and again in June, I believe, of 1973, and I believe I met with the SEC staff on at least one other occasion when there was no testimony.

Q The September session you referred to was a two-day session, is that correct?

A It was two days in September of 1972 and one day in November of 1972.



1 cs8 (Cusack - direct

2 Phillips' Exhibit PP.

3 (Defendant Philipps' Exhibit PP was marked  
4 for identification.)

5 MR. MUKASEY: I will offer both the personnel  
6 folder as a standard of comparison and PP as the document  
7 used to make the comparison.

8 MR. MacDONALD: No objection.

9 (Defendant Phillips' Exhibits OO and PP  
10 were received in evidence.)

11 Q Miss Cusack, based on your comparison of the  
12 Xerox copy of the signature appearing on Phillips' Exhibit  
13 PP in evidence and the signatures that you have used in  
14 Phillips' OO in evidence, can you tell us whether you  
15 have drawn any conclusion as to the genuineness and  
16 authenticity or the non-genuineness and authenticity of  
17 the signature on PP in evidence and, if so, what it is?

18 A I have formed an opinion and it is my opinion  
19 that the W. T. Richardson signature on Exhibit PP, on the  
20 Xerox copy of Exhibit PP, is a genuine signature written  
21 by W. T. Richardson or, if not, it is a forgery done by  
22 a very skillful, competent forgerer.

23 Q Can you give us the reason for the conclusion?

24 A My reasons for my opinion are based on the  
25 fact that in the Xerox copy containing the signature

xx



jpa

Wood-direct

5330

Q To the best of your recollection, when was the first time that you were shown that document?

A When I appeared before the grand jury in July of last year.

Q Mrs. Wood, to your knowledge, was any blank stationery of Farmers Home Administration ever kept in the office of Stirling Homex in Jackson or in the office of Perry, Phillips?

A No, sir.

Q Finally, Mrs. Wood, I am going to direct your attention to the signature on this document, W. T. Richardson, and ask you whether you traded or were ever asked to trace that signature by Mr. Phillips or by anyone else?

A No, sir, I have not been.

Q Or to sign it or draw it?

A No, sir.

MR. MUKASEY: No further questions.

MR. FELDSHUH: One question, your Honor.

CROSS EXAMINATION

BY MR. FELDSHUH:

Q With regard to your practice during the time you were employed by Stirling Homex and with regard to no restriction on access to the files as kept in that



1 haven't had available to you the actual range of  
2 scientific instruments that are available to you in the  
3 laboratory in Washington?  
4

5 A That is correct.

6 Q Having examined, in addition, those known  
7 signatures against the questioned documents, Government's  
8 Exhibit 290 and 291, have you come to any further con-  
9 cusion as to the genuineness of the signatures on 290  
10 and 291 regarding the additional examination using  
11 Government's Exhibits 7, 8, 1060, 1061 and Government's  
12 Exhibit 2?

13 A I again was unable to make a determination,  
14 a definite determination regarding the David Stirling  
15 signatures on those items based on characteristics which  
16 are in agreement, to a certain extent, with the questioned  
17 material.

18 I was unable to determine whether the  
19 signatures on Government's Exhibits 290 and 291 are or  
20 are not the genuine signatures. As a result of this  
21 comparison I was unable to eliminate David Stirling as  
22 the writer nor could I have determined whether these were  
23 or were not the authentic signatures.

24 Q After you examined the additional known  
25 exemplars in the last week, did that comparison make it



jpa

Kheel-direct

5375

1                   jpa                   Kheel-direct                   5375  
2                   ment of the   company allow you to designate certain  
3                   people on to a list that would   receive stock at the  
4                   offering price?

5                   A           I did submit the names of certain persons,  
6                   I believe, to the Pressprich Company.

7                   Q           But that was a privilege that the company  
8                   had, is that correct, that   they were allowed to desig-  
9                   nate a certain number of shares --

10                  A           I think I was told that that was the privi-  
11                  lege of the Company as well as of the R. W. Pressprich  
12                  Company.

13                  Q           And among the people that you designated  
14                  to receive shares were there members of any labor union?

15                  A           There were.

16                  Q           Which unions were those members of?

17                  A           They were the machinists   union, I believe,  
18                  and the seafarers union.   There might have been  
19                  one other.

20                  Q           As to all of those men did you know any  
21                  relation which the union which they were a member of  
22                  had to the Stirling Homex Corporation?

23                  A           They had no relationship to the Stirling  
24                  Homex Corporation.

25                  Q           Did you designate to receive at the offering



1 jpa Kheel-direct 5376

2 price any members of the carpenters union?

3 A I did not.

4 Q Did you have any conversation with David  
5 Stirling, Jr. or the top management at Stirling Homex  
6 as to designating members of the carpenters union to  
7 receive shares at the offering price?

8 A I did not.

9 Q Did you have any discussion as to members  
10 of the -- withdrawn. Any discussion with the top management  
11 of Stirling Homex as to their assisting members of the  
12 carpenters union in buying Stirling Homex stock at the  
13 opening price by, for instance, guaranteeing bank  
14 loans for the purchase of the stock or arranging the  
15 purchase of the stock at less than the market price?

16 A I did not.

17 Q Did you have any discussion either in 1970  
18 or in 1971 with David Stirling or any of the top manage-  
19 ment of Stirling Homex as to arranging the purchase  
20 of Stirling Homex stock from members of the carpenters  
21 union at above the market price?

22 A I did not.

23 Q Did you have any discussion in 1970 or  
24 in 1971 with David Stirling as to the purchase or sale  
25 of Stirling Homex stock by Patrick Campbell, Richard



1 jpa

2 Livingston, Samuel Ruggiano, William Konyha, Milan Marsh,  
3 Elmer Jacobs or Joseph Catalfano?

4 A I did not.

5 Q In 1971 the Stirling Homex Corporation made  
6 a second offering of stock to the public with Merrill  
7 Lynch as the underwriter, is that correct?

8 A That's correct.

9 Q And is it also correct that there was a  
10 part of that prospectus which dealt with labor rela-  
11 tions?

12 A That's correct.

13 Q Did you review the section of the prospectus  
14 that dealt with the labor relations before the prospectus  
15 went into final form and was given to the public?

16 A It was submitted to me and I read it, yes.

17 Q And made various suggestions for change?

18 A I don't recall any specific changes but  
19 I did review it in that sense, yes.

20 Q Now, at the time that you made that review  
21 and at the time that the sale of Homex stock was made  
22 to the public in 1971 did you have any knowledge at that  
23 time that stock of Stirling Homex had been bought for  
24 members of the carpenters union with loans guaranteed  
25 by any member of the top management of Stirling Homex?



jpa

Kheel-direct

5377

1 jpa  
2 MR. GAYNOR: Your Honor, I object to that  
3 question as not only leading, it states a fact not in  
4 evidence as one of the disputes in this case.

5 THE COURT: Well, the jury will under-  
6 stand that the question incorporates a premise of fact  
7 that is in dispute. I will allow the question to be  
8 asked. But the jury will understand the question is  
9 only as meaningful as you find the premise to be  
10 accurate. All right. Have you finished the ques-  
11 tion?

12 MR. MACBETH: Not quite, your Honor.  
13 Perhaps I can put it in a slightly different way.

14 Q At that time when the prospectus was being  
15 prepared and the stock was issued did you have any dis-  
16 cussions with anyone or did you see any documents  
17 that would have led you to believe in any way that stock  
18 in the Stirling Homex Company had been bought for  
19 members of the carpenters union and that the loans  
20 with which that stock was purchased were guaranteed by  
21 members of the top management of the Stirling Homex?

22 A I did not.

23 Q Did you see anything or hear anything that  
24 would have led you to believe that such a stock purchase  
25 had been made for members of the carpenters union at below



jpa

Kheel-direct

5378

market price?

MR. GAYNOR: I object to the form of the question. Did you hear of anything? I think that calls for a multitude of sins with respect to hearsay and everything else.

THE COURT: Yes, but I will allow it.

A I had no such information.

Q Did you have any information that would lead you to believe that there were any negotiations or any actual sale buy members of the carpenters union of Stirling Homex stock at above market price which had been arranged by any member of the top management of the Stirling Homex Corporation?

A I had no such information.

MR. MACBETH: I have no further questions.

MR. GAYNOR: May I proceed, your Honor?

THE COURT: Certainly.

CROSS EXAMINATION

BY MR. GAYNOR:

Q Mr. Kheel, my name is Albert Gaynor. I represent David Stirling. How do you do.

A How do you do, Mr. Gaynor.

Q I understand that you said you did not have any knowledge about any stock being purchased by the



jpa

Kheel-cross

5384

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2

Q Was he a home builder?

3

A He was a home builder.

4

Q His name is Julian?

5

A That's correct.

6

Q Now, therefore, when you came on the board

7

of Homex did you receive any stock?

8

A It was agreed -- not immediately, but

9

subsequently -- that I would be permitted to purchase

10

first 100,000 shares and then an additional 100,000 at

11

\$1 a share.

12

Q Did you do that?

13

A I did.

14

Q Now, in addition to becoming a member of

15

the board of directors you entered into the position

16

of labor relations counsel for Homex, is that correct?

17

A At a subsequent time, yes.

18

Q When was that?

19

A Well, I think actually I was formally re-

20

tained to do labor relations work after the agreement

21

with the carpenters had been negotiated.

22

Q You negotiated that agreement?

23

A Oh, definitely.

24

Q That was an arm's-length bargaining con-

25

tract back and forth?

jpa

Kheel-cross

5385

1  
2 A Not the slightest question about it.

3 Q Right?

4 A Absolutely.

5 Q So it was a genuine contract?

6 A It was as genuine a contract as there could  
7 be. It was a contract that had mutuality of inter-  
8 est. It was good for the company and it was good for  
9 the union.

10 Q Then when you became labor relations counsel  
11 you advised Homex on all of its labor questions, didn't  
12 you?

13 A From time to time, yes.

14 Q And when you were called upon to give an  
15 opinion you gave it, didn't you?

16 A Yes.

17 Q How long have you known Joseph Lane Kirk-  
18 land?

19 MR. MACBETH: Objection, your Honor.  
20 Can we approach the side bar?

21 THE COURT: Yes.

22 (At the side bar.)

23 MR. MACBETH: I believe this may be the  
24 beginning of a line of questioning by Mr. Gaynor in  
25 which he wants to go into the relations between Mr.



1  
2 A I don't have any such recollection, no.

3 Q Do you know what the American Foundation on  
4 Automation & Employment is?

5 A Yes, it is a not-for-profit foundation of  
6 labor and management that seeks to encourage the use of  
7 automation by trying to solve the problems of employment  
8 it creates.

9 Q Was Mr. Kirkland on that board with you?

10 A He was at one time. He is no longer.

11 Q Had you served on any other type of boards or  
12 directorships with Mr. Kirkland?

13 A The Institute of Collective Bargaining.

14 Q Anything else?

15 A I'm a member of the AFL-CIO Labor Studies  
16 Center, now called the George Meaney Labor Studies Labor  
17 Center, and he is a trustee of that also.

18 Q With respect to your duties as a director  
19 of Homex and as labor relations counsel to Homex, just  
20 prior to your negotiating the agreement with the Inter-  
21 national Union of Carpenters, did you see Mr. Kirkland  
22 about that?

23 A I did. After I became a member of the board  
24 of Stirling Homex I then became acquainted with the  
25 labor relations problem it possibly faced, namely, that



1 unions representing building construction workers might  
2 be hostile to buildings that were built in a factory  
3 whereas actually, as the carpenters recognized, this  
4 presented an opportunity for greater job opportunity, I  
5 sort out Mr. Kirkland to speak to him about the question  
6 of the attitude in the building trades towards manufactured  
7 housing.  
8

9 Q As a result of that conversation is it a  
10 fact that Mr. Kirkland recommended you to Mr. Finley  
11 Allen?

12 A Mr. Kirkland said that in his judgment the  
13 carpenters union was most concerned with coming to grips  
14 with this problem and he suggested that I might meet with  
15 Mr. Finley Allen.

16 Q And thereafter, following Mr. Kirkland's  
17 advice, you did meet with Finley Allen?

18 A I did indeed, yes.

19 Q And Mr. Allen is now deceased; is that  
20 correct?

21 A That is correct.

22 Q Did the international union agreement with  
23 HOMex flow from your conversation with Finley Allen?

24 A Yes, it did.

25 Q Mr. Sibley was also friendly with Mr. Kirkland,



1 with a union leader such as Mr. Kirkland, Mr. Turpe,  
2 Mr. Meaney?  
3

4 A They were investors in a project in the  
5 Dominican Republic in which I was also an investor.

6 Q What was the name of that?

7 MR. MACBETH: Objection, your Honor.

8 I think this is going very far afield.

9 THE COURT: Yes, sustained.

10 Q Do you know a man named Peter Turzik?

11 A I do.

12 Q Who is he?

13 A He was an official of the carpenters union  
14 who retired, I believe, some time in this period that  
15 you are asking me about.

16 Q Did you ever arrange to purchase any Homex  
17 stock from Mr. Peter Turzik?

18 A I did not.

19 Q Did you ever call Mr. Terzik on the telephone  
20 and identify yourself as Mr. Kheel and offer to arrange  
21 stock for him in Homex?

22 A I don't believe so. I have no such recollec-  
23 tion.

24 Q You have none?

25 A No.

1 A If he did it would have been, yes.

2 Q Do you know how many members there are in  
3 that machinists union?

4 A Currently?

5 Q Yes.

6 A There are about 750,000 dues payers at the  
7 present time. There were about 950,000 at the time we  
8 are talking about.

9 Q Machinists are primarily involved in the air-  
10 craft industry, aren't they?

11 A No, they are involved in manufacturing.  
12 They are in th aircraft --

13 THE COURT: I'm going to ask that you get  
14 somewhere in the vicinity of the direct, please.

15 MR. GAYNOR: Yes.

16 Your Honor, may I offer that exhibit which I  
17 neglected to do a momenta go, 485, please.

18 MR. MacDONALD: -- No objection.

19 (Defendant Stirling Exhibit 485 was received  
20 in evidence.)

21 Q Mr. Kheel, how many shares of Homex stock did  
22 you arrange for your friends?

23 A I can't remember precisely, but I would judge  
24 several thousand.  
25

xx



cs21

Kheel - cross

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Q May I show you Defendants' Exhibit 52 for identification and ask you if you would look at that, sir, and read it to yourself perhaps that will refresh your recollection.

A Yes. This appears to be on my stationery and it speaks of 5000 shares.

MR. GAYNOR: I offer in evidence Defendants' Exhibit 52.

MR. MACBETH: No objection.

(Defendants' Exhibit 52 was received in evidence.)

MR. GAYNOR: May I read this to the jury, please?

(Defendant Stirling Exhibit 52 was read from

By Mr. Gaynor.)

Q Mr. Kheel, who were the people that you set aside that stock for?

A Those that you have been mentioning. I don't recall all of them at this time.

Q We went through a number of people. As to Joseph Lane Kirkland, did you arrange for any stock for him?

A No.

Q Did you ever prepare a promissory note for

xx

cs22

Kheel - cross

5409

1 Joseph Lane Kirkland's signature in the amount of  
2 \$58,300 for purchase of stock in Homex?  
3

4 A I did not.

5 Q Mr. Kheel, I show you Government's Exhibit  
6 866 in evidence. I draw your attention, sir, to the page  
7 which appears to be a Xerox copy of a promissory note  
8 dated "March 1970" wherein Mr. Lane Kirkland agreed  
9 to pay Central Trust Company \$58,300.

10 Did you prepare that note for his signature?

11 A I did not.

12 Q Would you look at the envelope, the Xerox  
13 copy of the envelope just below that, it being addressed  
14 to David Stirling, Jr. of Stirling Homex Corporation,  
15 1150 East River Road, Avon.

16 Did you ever send that envelope to Mr.  
17 Stirling?

18 A I did not.

19 Q Is that envelope from your law firm?

20 A It appears to be, yes.

21 MR. GAYNOR: May I have your Honor's indulgence  
22 for one moment, please?

23 (Pause.)

24 Q Did you put Mr. Kirkland's name on the Homex  
25 list to receive shares of Homex stock?



cs23

Kheel - cross

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A I did not.

Q Did you have any conversations with Mr. Langone of Pressprich & Company with respect to giving stock to union people?

A No.

Q Did you ever deliver that note that I just showed you to David Stirling, that note of Lane Kirkland?

A I never saw that note before it was shown to me by the SEC during the course of its investigation.

Q Are you aware that Mr. Lane Kirkland testified before the Securities and Exchange Commission and grand jury?

A I was told that he testified, yes.

Q And Mr. Kirkland's testimony was that you prepared the note and he signed it in your office in your presence, would that be correct or incorrect?

MR. MACBETH: Objection.

THE COURT: Sustained.

The jury will disregard the question.

The jury will understand that the way you get the testimony of any witness into this record is by calling him as a witness.

Please proceed.

MR. GAYNOR: Yes, your Honor.

1 jpa Kheel-redirect  
2 carpenters union and the Stirling Homex Corporation?

3 A That's correct.

4 MR. MACBETH: No further questions.

5 MR. GAYNOR: I have no further ques-  
6 tions, your Honor.

7 THE COURT: All right. Thank you,  
8 Mr. Kheel.

9 (Witness excused.)

10 A L L A N K R A M E R, called as a witness  
11 by the government in rebuttal, being first  
12 duly sworn, testified as follows:

13 DIRECT EXAMINATION

14 BY MR. MACBETH:

15 Q Mr. Kramer, what is your occupation?

16 A I'm an attorney.

17 Q By whom are you presently employed?

18 A Haskins & Sells.

19 Q And in the year 1970 through 1972 by whom  
20 were you employed?

21 Before you answer that I ask you to keep  
22 your voice up so you can be heard at the back table.

23 A I was a partner of Shea, Gould, Climenko &  
24 Kramer.

25 Q What was your relationship in 1970 to 1972



cs4

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Do you have another witness?

3

MR. MACBETH: Yes, there is another witness.

4

THE COURT: That will not be lengthy.

5

6

MR. MacDONALD: I'm afraid that your Honor was led to that conclusion because I didn't --

7

8

9

10

THE COURT: Look, please sit down. I was led to that conclusion by listening to both of you and the way I get to conclusions is by getting there and I have made it and I have ruled.

11

12

Please be seated. I'm even supposed to make errors occasionally which have to be borne.

13

14

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19

MR. MACBETH: It has come to our attention that apparently in the witness room are Mr. Kirkland and Mr. Terzik. It would appear to me, though I haven't had an opportunity to ask Mr. Gaynor and Mr. Feldshuh what they would be called for, that the only real point of their testimony would be to attempt to impeach the credibility of Mr. Kheel.

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21

22

23

24

25

Mr. Kirkland was not a member of the carpenter's union. Mr. Terzik was no longer a member of the carpenter's union at the time this offering took place. Mr. Terzik, of course, does not appear on any list of guaranteed loans and there is simply no basis in terms of the indictment and the charges in this case to bring



1 cs5

2 those men before the jury and to elicit testimony from  
3 them that I can see. On that basis the Government  
4 would move to exclude them from testifying in this trial.

5 MR. GAYNOR: May I be heard, your Honor?

6 THE COURT: Yes.

7 MR. GAYNOR: I alluded some time ago, a few  
8 days ago, that I might ask for surrebuttal with respect  
9 to Messrs. Kirkland and Terzik.

10 THE COURT: I will allow Kirkland, but the  
11 other one, no.

12 MR. GAYNOR: May I just be heard for 30 words  
13 as to Mr. Terzik?

14 I asked Mr. Kheel if he had arranged for stock  
15 from Mr. Terzik of Stirling Homex and Mr. Kheel said no.

16 THE COURT: I don't care. I don't allow  
17 surrebuttal very much anyhow, but some discretionary  
18 limits have to be put on when I do allow it. You asked  
19 him about lots of people. We could have his whole  
20 family here, and I don't want them. But I will allow  
21 Kirkland.

22 MR. MACBETH: Can I bring one additional point  
23 to your Honor's attention?

24 After Mr. Kirkland testified before the SEC  
25 he swore out an affidavit in which he went back over



1 jpal5 Kirkland-direct

2 recall the precise date. I met them on perhaps two  
3 or three or four other occasions at receptions or  
4 affairs of that sort.

5 Q Mr. Kirkland, did you ever have a conver-  
6 sation with David Stirling or William Stirling about  
7 your acquiring Homex stock?

8 A No, sir, not to the best of my knowledge  
9 or recollection.

10 Q Do you know a man by the name of Theodore  
11 Kheel?

12 A Yes, sir.

13 Q How long have you known him?

14 A I would say since the late -- middle or late  
15 '60s.

16 Q What is your relationship with him?

17 A We have been long personal friends. I have  
18 been associated with him on some labor-management dispute  
19 situations. I think they would include a dispute on  
20 the railroads where a national board was set up I worked  
21 on; one of the subway disputes in New York; in the  
22 Automation Foundation; and an organization called the  
23 Institute for Collective Bargaining, which I was active  
24 in.

25 Q Now, Mr. Kirkland, did you ever have a conver-

1 jpal6 Kirkland-direct

2 sation with Theodore Kheel about your obtaining Stirling  
3 Homex stock?

4 A Yes, sir.

5 Q Could you tell us, please, where that conver-  
6 sation took place?

7 A In Florida in February of 1970.

8 Q Now, sir, could you please tell us as best as  
9 you can recall in substance or otherwise what Mr. Kheel  
10 said to you and what you said to him with regard to  
11 your acquisition of Homex stock?

12 A As best I can reconstruct it, sir, and it  
13 has been a good while ago and my recollection is not  
14 precise, on an occasion or two where we met and we  
15 saw each other in Florida at that Mr. Kheel indicated  
16 to me that there would be a public issue of the stock  
17 of this company, that its prospects were very good,  
18 that it was in great demand, and that if I saw fit that  
19 he could probably arrange for me to secure some of the  
20 stock at the offering.

21 I expressed --

22 Q Excuse me. Go ahead. Did you finish,  
23 sir?

24 A All right, sir.

25 Q Please finish if you have anything further



1 jpal7 Kirkland-direct

2 to say.

3 A I expressed interest but subsequently we --  
4 I think certainly before the offering -- the issue arose,  
5 I think I raised it, in view of the fact that this stock  
6 was so eagerly sought after that it might be best if  
7 I did not take it in the offering since that would  
8 appear to be a privileged or advantageous circumstance  
9 and position.

10 I believe that he suggested to me that if  
11 those reservations existed, that they could be  
12 avoided by placing an order for what I think is referred  
13 to as the second market, or when the stock becomes  
14 publicly available after the initial offering, when  
15 a market price is set and it is available to anyone,  
16 and that normally it would be -- a stock of this kind  
17 would be available in that second market or secondary sale  
18 that was within three or four points of the initial  
19 price, and that any reservations could be laid to rest  
20 and the stock still purchased at a reasonable price  
21 in the second market.

22 I indicated that this sounded better to  
23 me and that I would be prepared to do it and asked him  
24 to make the arrangements on the assumption that it  
25 would be -- the price would be within that range of

1 jpal8 Kirkland-direct

2 three or four points.

3 Q Now, sir, so that -- as I understand it, you  
4 had those two conversations with Mr. Kheel, is that  
5 right? Was that one conversation or was that two  
6 conversations you had with him?

7 A I don't recall precisely, sir. I know  
8 that we saw each other for lunch or perhaps for dinner  
9 or a drink two or three times during this period, and  
10 whether it was one conversation or a series of conver-  
11 sations I am afraid I simply can't say. I don't  
12 know.

13 Q Did there come a time after those conversa-  
14 tions, Mr. Kirkland, that you signed a document in  
15 Mr. Kheel's office?

16 A I believe so, sir.

17 Q Mr. Kirkland, I direct your attention to  
18 Government's Exhibit 866 in evidence. You may thumb  
19 through the whole thing if you like, but I would like  
20 to direct your attention here, if I may, and I show you  
21 this document, sir, what purports to be a promissory  
22 note containing your signature in the amount of \$58,300  
23 to the National Bank. I show you that, sir, and ask  
24 you if that is your signature?

25 A I believe that is my signature.



1 jpal9 Kirkland-direct

2 Q Did you ever see the original of this  
3 document?

4 A I saw a document, the original of which --  
5 a document that certainly I would take to be the original  
6 of that, if I may put it that way, on two occasions:  
7 at the grand jury hearing and at the SEC.

8 Q And this was like the document you signed  
9 in Mr. Kheel's office?

10 A In form that is -- I recall, and I so testi-  
11 fied, that I had a fragmentary memory of signing in  
12 Mr. Kheel's office a document which was a blank sort  
13 of note form of the type that this document appears  
14 to be. I do not have any recollection -- I have no  
15 recollection of the entries on that document.

16 Q Are you finished, sir?

17 A Yes. There is one other point I wish  
18 to make, that following the issuance of the Stirling  
19 Homex stock, the public offering, I have a recollection  
20 of seeing Mr. Kheel two or three days later, at which  
21 point he told me that the stock had exceeded the secondary  
22 second market price, it exceeded the levels which we had  
23 discussed to such an extent as to -- would be well  
24 beyond any expectations or the point that we had talked  
25 about. Therefore, I was -- none had been purchased

1 jpa20 Kirkland-direct-cross  
2 on my behalf.

3 Q Have you finished, sir?

4 A Yes.

5 MR. GAYNOR: I have no further questions,  
6 your Honor.

7 CROSS EXAMINATION

8 BY MR. MACBETH:

9 Q Mr. Kirkland, are you a member of the car-  
10 penters union or have you ever been a member of the  
11 carpenters union?

12 A No, sir.

13 Q Were you directly involved in employer-  
14 employee negotiations between the Stirling Homex Company  
15 and the carpenters union?

16 A No, sir.

17 MR. MACBETH: No further questions, your  
18 Honor.

19 THE COURT: Anything else?

20 MR. GAYNOR: No.

21 THE COURT: Thank you, Mr. Kirkland.

22 (Witness excused.)

23 THE COURT: That concludes surrebuttal,  
24 gentlemen?

25 MR. GAYNOR: For me it does, yes, your



1           cs2  
2           plan to reconvene to begin summations tomorrow morning  
3           at 9.30. ~~3~~

4                       Good afternoon.

5                       (The jury left the courtroom.)

6                       THE COURT: Are we ready to go through the  
7           requests to charge? I told you I expect this to take  
8           longer than any of us would like because I have some  
9           questions.

10                      MR. GAYNOR: Your Honor, is this an appropriate  
11           time to make motions at the conclusion of the whole case?

12                      THE COURT: Yes, go ahead.

13                      MR. GAYNOR: May I lead off, then, your Honor,  
14           and direct myself and your Honor's attention to the  
15           defendant William Stirling.

16                      Your Honor, I submit that under U. S. against  
17           Geaney and the Wiley case -- I repeat the motion I made  
18           at the conclusion of the Government's case -- there has  
19           been nothing added to the case by the Government either  
20           in rebuttal or in the defendants' case itself, and I  
21           respectfully urge your Honor to grant a motion for  
22           acquittal pursuant to Rule 29 on the ground that the  
23           evidence taken as a whole does not represent what reason-  
24           able man might fairly conclude to be, that the defendant  
25           William Stirling could be found guilty beyond a reasonable

1 requests ne both attacked the Government and then  
2 proceeded to suggest his better version of what the  
3 instructions should be. I appreciate that approach.  
4 As I go through the requests, let me ask you all to take  
5 that approach in this sense:  
6

7 If I am granting a request to which you have a  
8 particular or even some general objection, please state  
9 the objection right then and there, thus preserving the  
10 record, as we say, so that you won't have to repeat those  
11 exceptions after I charge the jury and perhaps, in  
12 addition, and more importantly, helping to make the  
13 charge more balanced and fair than might otherwise be the  
14 case.

15 Let me give you one other caution, and then  
16 we'll go ahead:

17 I commonly, because I don't usually take a  
18 request that I'm granting and give it verbatim, I commonly  
19 indicate that I'm granting something in substance and I  
20 realize, remembering still having once been a lawyer, that  
21 that is a treacherous kind of ruling. I simply assure  
22 you that I make it in good faith, but you will have to  
23 listen to the charge, and if something that I said I was  
24 giving in substance I don't really give, I will hear your  
25 exceptions at the proper time.



1 cs3

2 doubt.

3 I think your Honor has sat with absolute  
4 attention throughout the trial and I needn't point out  
5 the paucity and insufficiency of the evidence against  
6 William Stirling.

7 With that I respectfully so move.

8 THE COURT: I will deny it again, Mr. Gaynor,  
9 for reasons we touched on earlier.

10 MR. GAYNOR: I make a motion then also with  
11 regard to David Stirling, without going into the litany.

12 THE COURT: Yes. I will assume that all  
13 defendants move for acquittal at this point and preserve  
14 all the rights given by such motions, and may I do that  
15 and simply tell you that I'm denying them.

16 MR. FELDSHUH: I consent, your Honor.

17 MR. EATON: Yes, your Honor.

18 At some point I would like to discuss what  
19 has come to be called the Natelli point with respect to  
20 this motion.

21 THE COURT: I think that is included in the  
22 rulings on the requests and we'll go through all of  
23 that..

24 Now, Mr. Eaton did something that I hardly  
25 ever see, which I think is a very useful thing. In his

1                   Let's go in order.    I will start with the  
2  
3                   Government's requests.

4                   MR. FELDSHUH:   Would you just hold for one  
5                   second until I move this mass of material away?

6                   THE COURT:   Yes.

7                   (Pause.)

8                   THE COURT:   Let's go with the Government on  
9                   request No. 1.

10                   I will grant all of those in substance, except  
11                   I don't think we need G, charts and summaries.    I have  
12                   already told the jury how to deal with that and I don't  
13                   think it will help to repeat it, and I will not give I  
14                   unless some defendant's summation evokes it by references,  
15                   which I think should not be made, to punishment.    But if  
16                   no defendant refers to that subject, directly or indirectly,  
17                   I will not give the Government's I.

18                   MR. FELDSHUH:   With regard to H, since H, I  
19                   don't believe --

20                   THE COURT:   H is out of the case.

21                   MR. FELDSHUH:   Thank you, sir.

22                   MR. EATON:   One question about I.

23                   What is your Honor's opinion of the statement  
24                   in summation that a man's liberty is at stake?

25                   THE COURT:   That is exactly the kind of



cs6

A 505

statement that will leave me to give I.

MR. GAYNOR: What about the importance of the case to the defendants, your Honor, in terms of -- just importance to the defendants.

THE COURT: You certainly can speak to that.

MR. GAYNOR: I take it that consequences would go beyond that?

THE COURT: -- Look, we are all law school graduates. If you want to start a negotiation here I don't want to get into it. You are now advised that this boiler plate item is one that I usually don't give and if anybody steps over what foggy line I have in my head that crosses the boundaries of fairness requiring me to give it, I give it. I'm not going to give you any more warranties than that. I don't like it and I prefer not to give it. At some point I am driven by -- some creepy devotion to our trade to try to be fair to the Government as well as other people and if you push me to that extent I will give it.

Now you just use your judgment. Okay.

Request No. 2 is granted in substance.

I will outline the indictment. I probably won't get to conspiracy there but postpone it till we get to the ninth count, but otherwise that will be it.

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I will give an abbreviated version of request No. 3 and try and point out to the jury the principles of disclosure that underlie the securities laws without as much detail as the Government's version suggests.

I will grant request No. 4 and substantially grant request No. 5, also No. 6 is granted in substance.

MR. FELDSHUH: On request No. 4, where you've got the second full paragraph which starts with, first, that in connection with the offer of sale of Stirling Homex common stock -- I'm troubled a little by that your Honor, insofar as the sale of the common stock, if it is referable to the offering as based upon the prospectus, would that not in terms of the indictment coming down in 1976 have statute of limitations implications?

In my request to charge there is the statute of limitations being so charged so that if the jury should come to the conclusion that the only place where there were any falsehoods or false statements or material omissions was in connection with the Pressprich offering and they must acquit.

THE COURT: How would you handle that?

MR. FELDSHUH: I think in my request, your Honor, I did lay out such a request. I want to make



1       sure that I don't waive it by just going along here.  
2  
3       I would say that if you should find that the Government  
4       has filed to prove beyond a reasonable doubt any materially  
5       false misstatements or omissions in connection with  
6       the offering which took place in 1971, but you do find  
7       that there were false statements and material omissions  
8       in connection with the offering in 1970, to wit, February  
9       19, 1970, then I instruct you that you must acquit these  
10      defendants as the same is barred -- you don't need even  
11      to say anything about the statute of limitations.

12               THE COURT: Doesn't that all come in under any  
13      charge I may give on the statute of limitations?

14              MR. FELDSHUH: I would say yes.

15              THE COURT: Rather than here?

16              MR. FELDSHUH: Yes, I would say so. I want  
17      to make absolutely certain on that one point on the  
18      statute of limitations as it appears with the common  
19      stock and with regard to the Pressprich offering.

20              THE COURT: Theoretically let me be sure I  
21      understand that. You can have a conviction based  
22      upon a finding of fraud in connection with the sale of  
23      common stock because the jury found other misstatements  
24      within the limitations period that affected purchasers of  
25      the common, and if that is so the request No. 4 as given

cs9

A 508

1 states the law accurately and the limitation you asked  
2 for, it seems to me, would come in under the instruction  
3 on the statute of limitations.  
4

5 MR. FELDSHUH: All right. I want to preserve  
6 that. I've just narrowed it to the Pressprich offering,  
7 sir.

8 THE COURT: Let me ask you to reserve on that  
9 until we get to your requests.

10 MR. FELDSHUH: Thank you, sir.

11 THE COURT: We will see how that looks,  
12 because I don't remember where we are in that.

13 MR. FELDSHUH: All right.

14 THE COURT: Request No. 7 is a request with  
15 respect to which Mr. Eaton raised some objections of  
16 substance, but I think I have wound up overruling them  
17 and therefore I think it is correct to inform you that I  
18 am granting 7 in substance, that is, I think first, if  
19 I remember his objections, this is a case where it is  
20 permissible and appropriate to instruct on the possible  
21 consequences of a defendant deliberately closing his eyes  
22 so as to avoid knowledge of the facts he would otherwise  
23 find disagreeable, and again I'm going to give these  
24 principles just in the form of principles and let you  
25 argue back and forth how they apply to the case.



1 cs10

2 And secondly, I do not agree that it is  
3 unfair to tell the jury the kind of things that could  
4 be evidence of wilfulness. I will try to balance that  
5 by suggesting the opposites.

6 Perhaps, Mr. Eaton, it would have been better  
7 if you had given me an instruction of pros and cons.  
8 I suppose what I will do is put in some thoughts of open  
9 dealings and full disclosures and normal business  
10 practices, and attempting to balance it in that way I  
11 will give this enumeration that the Government has on  
12 pages 5 and 6 of its request No. 7.

13 Request No. 8 is granted in substance,  
14 and also 9, 10, 11 and 12.

15 Also I will grant in substance 13, 14, and 15.

16 Does anybody want to be heard particularly on  
17 any of those?

18 MR. FELDSHUH: Does your Honor mind if I sit  
19 in the witness box?

20 THE COURT: Go ahead.

21 All right, No. 16 is granted in substance.

22 No. 17 is denied.

23 MR. GAYNOR: Could I have just a moment, if  
24 your Honor please?

25 THE COURT: Yes.

1 cs11

2 (Pause.)

3 THE COURT: No. 18 is granted in substance.

4 As to No. 19, it is granted in substance,  
5 and what I'm denying is Mr. Eaton's editorial suggestion  
6 or legal suggestion that based on the Diogo case -- I  
7 find the circumstances of this case provided the jury  
8 is instructed on wilful and knowing conduct as the  
9 requirement to put it in terms of whether the defendant  
10 thought it was false or not as an extra item doesn't  
11 eliminate it.

12 Of course I assume, Mr. Eaton, you will be  
13 arguing this. You are free to argue the lack of guilty  
14 knowledge or intent and I think that really covers the  
15 subject.

16 MR. EATON: When your Honor says that I'm free  
17 to argue what the questions meant and the statements meant --  
18 to Mr. Schulz?

19 THE COURT: Sure, to the extent the evidence  
20 let's you argue that, but that all goes to his intent and  
21 his state of mind.

22 No. 20 is granted in substance and also 21  
23 will be given in substance.

24 Do you have any particular thing that bothers  
25 you in here?



1  
2 MR. EATON: I think that with respect to  
3 request No. 21 the thing I would be most interested in  
4 is that at this point there be a clear instruction to the  
5 jury that association plus knowledge is not sufficient.

6 THE COURT: Association plus knowledge?  
7 Do you have some complaint about the request as given?  
8 You mean it leaves that out?

9 MR. EATON: I believe so, your Honor. I was  
10 looking at my objection to the Government's request and  
11 I felt it stated that the Government's request did not  
12 state clearly enough that association plus knowledge is  
13 not sufficient.

14 THE COURT: I don't agree. I think if you  
15 look at the bottom of page 2 and the top of page 3 it is  
16 covered quite sufficiently -- association and knowledge  
17 and participation.

18 MR. EATON: My problem is that they seemed  
19 to be handled separately and that the jury might get  
20 the impression that association alone isn't enough and  
21 knowledge alone isn't enough, but that if you put the two  
22 together it would be enough.

23 THE COURT: What the jury will decide not to  
24 listen to in the course of three hours is also a question  
25 in my mind, but it is all here. It is said at least

1 csl3

2 twice:

3 He's got to act in some way to bring about  
4 the success of the venture if he does participate with  
5 knowledge. I think it is enough. You may buttress  
6 it in the extended period of argumentation you have.

7 It escapes me, Mr. Eaton, where it was referred  
8 to -- I just don't remember when you informed me somewhere  
9 in the course of your request that the Government has  
10 limited its case to two overt acts.

11 What is that about?

12 MR. EATON: Your Honor, originally the indict-  
13 ment listed four overt acts. On my motion your Honor  
14 struck out two of them because they antedated the statute  
15 of limitations and I had also made a motion addressed  
16 to the prefatory language about overt acts which vaguely  
17 incorporated everything that had gone before and at that  
18 time Mr. MacDonald stated that he would proceed only  
19 on those two overt acts which remained of the original  
20 four.

21 THE COURT: And those are numbers 3 and 4?

22 MR. EATON: I don't have it in front of me,  
23 your Honor.

24 MR. MACBETH: That is correct. You will see  
25 the reference in the request. The indictment is being



redacted and is being retyped. They will now be numbered 1 and 2, so the jury on seeing the indictment won't know that those are stricken out. So what we are speaking about are Overt Acts 3 and 4 which will be renumbered 1 and 2.

THE COURT: Are we all together on that, then, that we have two overt acts?

Is the introductory business struck out of the redacted indictment?

MR. EATON: Your Honor denied that motion because of the understanding that nothing would be argued on overt acts except No. 3 and No. 4, which I guess will now be called No. 1 and 2.

THE COURT: Okay.

I would like to reserve briefly on No. 23. We will come back to it.

MR. FELDSHUH: Did your Honor cover 22?

THE COURT: Yes, it is granted in substance with that conversation we just had.

MR. FELDSHUH: Yes, of course.

THE COURT: I will give the substance of 24 in connection with the charge on criminal intent, knowledge and wilfulness.

25 I will grant in substance.

1 csl5

2 Whom do we have in mind, Mr. Macbeth or Mr.  
3 MacDonald, in 26 when we speak of accomplices here?

4 MR. MacDONALD: Two spring to mind who gave  
5 false statements, Bernie Frank to the grand jury and Mr.  
6 Richardson to the SEC and the grand jury in pursuit of the  
7 cover-up phase.

8 I guess Judy Howard is another, SEC and grand  
9 jury in Rochester.

10 (Continued on next page.)  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



1 jpal

2 THE COURT: Okay.

3 MR. MAC DONALD: Off the top of my head I  
4 think there are three.

5 THE COURT: Does anybody else have  
6 anybody else in mind?

7 MR. GAYNOR: I suppose it would be the  
8 labor union.

9 MR. MAC DONALD: It would not immunize  
10 the witnesses. I don't know if that's what Mr. Gaynor  
11 had in mind.

12 MR. GAYNOR: They were shown the jail house,  
13 your Honor.

14 THE COURT: Well, I will not try to give  
15 a list. I just thought we'd air that a little bit  
16 so you can think about it in argument. How many  
17 witnesses in the end have immunity?

18 MR. MAC DONALD: Woods technically did  
19 not have immunity at the time of the trial. The immuniza-  
20 tion was a grand jury immunization.

21 MR. GAYNOR: He was asked, wasn't he? He  
22 said yes, he had immunity, except for testifying here.

23 MR. MAC DONALD: But the understanding he  
24 had as to what was --

25 THE COURT: All right. I won't indicate

1 jpa2

2 them. I will just refer to it and say a number of  
3 them have it and the jury can consider that.

4 27 is denied, at least in the strong form  
5 of its submission. But I will tell the jury they  
6 can consider a defendant's interest along with other  
7 kinds of interests and that it is a strong interest.

8 28 is denied. That you may argue, but  
9 that's kind of a factual thing I don't think needs to  
10 be instructed on. I will put in something of  
11 sympathy but I suppose very little.

12 In some small measure No. 29 is granted.  
13 The business about it being important to the defendant  
14 and to the public and all that I usually don't  
15 give. Again, you can all argue at that fact.

16 30 is denied.

17 Now let's go to the requests of David and  
18 William Stirling and Yarold Yanowitch.

19 MR. GAYNOR: Your Honor, would it be  
20 appropriate -- there are two additional requests that  
21 I have not got in there. I'm sure you gave it 100  
22 times. The one about the defendant not taking the  
23 witness stand.

24 THE COURT: We will talk about that.  
25 Let me go through the ones you did submit. Anything



1 jpa3

2 additional why don't you hold, and I have a whole list  
3 of questions for you and that's one of them.

4 I will call these the Stirling requests,  
5 if I may.

6 No. 1 is denied.

7 No. 2 is granted in substance. I think  
8 I have already covered that but I will mention it again.

9 No. 3 is granted in substance, except for  
10 th last paragraph on the second page, which is denied.

11 No. 4 is granted in abbreviated sub-  
12 stance. I will give the substance I think of No. 5.

13 I think the substance of No. 6 will be  
14 in. I somehow get into three elements rather than  
15 four. The second sentence of that last paragraph  
16 on the first page, I don't really understand so I don't  
17 think that will be in. But I think the substance  
18 of this will be in.

19 Also, the substance of request No. 7, except  
20 that beginning at about the eighth line of the second  
21 page all of that is denied for the rest of that page.

22 MR. FELDSHUH: Starting with the word  
23 "Thus," your Honor?

24 THE COURT: Yes, around there. Starting  
25 in the prior line: If any, you must consider each

one's acts and statements."

MR. FELDSHUH: Does that include the rest of the paragraph all the way down the page?

THE COURT: The rest of that page, yes.

No. 8 is granted in substance.

No. 9 is granted in substance, tacking on the sentence that is part of the standard boiler plate on that.

No. 10 is granted in substance.

Also No. 11.

Also -- I don't know if this is a case for use of the word "informer" but I will think about that. Anyhow, the substance of No. 12 is granted.

MR. GAYNOR: I missed No. 11, your Honor.

THE COURT: I grant that -- 11?

MR. GAYNOR: Yes.

THE COURT: I think that was granted in substance.

MR. FELDSHUH: No. 12, sir?

THE COURT: Also No. 12.

Also No. 13.

No. 14 is denied.

Now, No. 15, I take it, is part of your statute of limitations. Is that all you have, Mr.



1 jpa5  
2 Feldshuh?

3 MR. FELDSHUH: Well, the Alfonzo Perez  
4 case is so current and I think the reading of the case  
5 is so clear. That's all I've got on it. I  
6 thought that that was fairly authoritative, your Honor.

7 THE COURT: What do you mean, you want  
8 me to read the opinion?

9 MR. FELDSHUH: No, I think this will do it.

10 THE COURT: Just this one sentence?

11 MR. FELDSHUH: Right. If your Honor  
12 wishes to amplify in further of the terms of the indict-  
13 ment which charges the overt act, I would like to see  
14 the redacted indictment so I can get a feeling for  
15 it.

16 THE COURT: Look at the indictment. You  
17 have a copy of the indictment. There is nothing  
18 very fancy. Redaction is such an elegant word, people  
19 keep thinking it is like the new version or the movie  
20 version where it is just taken out of 1 and 2 or  
21 making 3 and 4 1 and 2. You can envision that.

22 MR. FELDSHUH: I am satisfied with this,  
23 sir.

24 THE COURT: I don't know if I will stick  
25 that literally on the statute of limitations on that.

1 jpa

2 MR. FELDSHUH: Well, it can be expanded  
3 upon.

4 THE COURT: No. 16 I will grant in sub-  
5 stance somewhere along the way.

6 I guess I will grant the substance of No.  
7 17, except for the first sentence. I don't know that  
8 the problem of prediction or opinions is really in this  
9 case.

10 I think I will grant the substance of 18 as  
11 far as it goes.

12 MR. FELDSHUH: May I back up a moment.

13 THE COURT: Yes.

14 MR. FELDSHUH: When the first sentence  
15 of 17 is knocked out are we not losing sight of scienter  
16 as the same is now articulated, certainly in the outflow  
17 of Ernst against Hochfelder? When we talk about  
18 scienter under Ernst such an integral part of even a  
19 civil case of securities violation is predicated upon  
20 an honest opinion which may be --

21 THE COURT: If that's what you mean I  
22 will lay on it even harder than that. I will tell  
23 them that good faith is an absolute defense in this case.

24 MR. FELDSHUH: Thank you.

25 THE COURT: I just don't think this



1 jpa

2 lawyer's distinction between an opinion and prediction  
3 and a statement about an existing fact, which is what  
4 I read into this --

5 MR. FELDSHUH: Right, sir. Thank you,  
6 sir.

7 THE COURT: I guess with that same quali-  
8 fication, the substance of 18 will be granted.

9 19, I won't give the first sentence, or  
10 paragraph, but I will give the substance of the second.

11 I guess the substance of 20 will be covered  
12 by the charge on good faith.

13 21, parts of it I will grant. The  
14 second full paragraph I deny. It overlooks the aiding  
15 and abetting possibility. I think the rest of it  
16 more or less will be covered in substance, although  
17 perhaps more briefly.

18 22 is granted in substance.

19 We come to Mr. Eaton's request for de-  
20 fendant Schulz. I think, Mr. Eaton, that I have up  
21 to this point covered your attack requests. So  
22 let's go to your affirmative request on behalf of  
23 Mr. Schulz.

24 Now, I don't have any written views of the  
25 government on request No. 1, venue. Does the govern-

1 jpa 5510  
2 ment have any views to be submitted orally? Do you  
3 consent to this request?

4 MR. MAC DONALD: If I may have a moment.

5 MR. FELDSHUH: Your Honor, are we con-  
6 sidering objections now of Schulz?

7 THE COURT: No, I just finished saying  
8 I think I have covered them.

9 MR. GAYNOR: Your Honor, I need a point  
10 of personal privilege. Can Mr. Feldshuh carry on for  
11 me.

12 THE COURT: Do you want me to declare  
13 a recess or do you trust him?

14 MR. GAYNOR: I trust him. If you just  
15 give me a few minutes.

16 MR. MAC DONALD: I regret that we haven't  
17 had a more studied response in response to your Honor's  
18 request. I think we would object to the charge in  
19 its submitted form, your Honor. I don't know that  
20 there is any authority to ask a jury to make a sort of  
21 special factual venue finding where the defendant  
22 wilfully joined a criminal conspiracy thinking about  
23 the Southern District of New York when he did so, which  
24 is what I get to be the tenor of this second, sub-  
25 part to the next-to-last paragraph. I don't believe



1 jpa

2 that the law requires that one have thoughts about the  
3 Southern District of New York when they are entering  
4 into a scheme to mislead the investing public.

5 THE COURT: Well, I hate to make you work  
6 any harder than you have done, but I would like the  
7 charge to be right and I would like you to address it  
8 or get one of your colleagues to help you, but I want  
9 the government's counterproposal first thing in the  
10 morning.

11 Frankly, I am in some doubt about the  
12 extent to which venue is a proper jury question at all.  
13 That may be just a reflection of my ignorance. But  
14 if it is a proper jury question I am in some doubt about  
15 whether the standard criminal burden of proof applies  
16 to it.

17 In your warehouseful of boiler plate and  
18 learning there must be some material on this subject.  
19 I would like you to explore it and give me the  
20 benefit of the government's views tomorrow morning,  
21 first thing.

22 MR. MAC DONALD: Yes, your Honor.

23 THE COURT: This also harks back, Mr.  
24 Eaton to the Pinkerton thing. I think if we are going  
25 to have venue problems in this case raised by any de-

1 jpa

2 with respect to any count, conspiracy or any of the  
3 substantive counts, that pushes the balance in the  
4 government's direction and justifies a Pinkerton  
5 charge. I don't say that in drawing but it is my  
6 appraisal of the situation.

7 I don't know if you want to press the venue  
8 question. No other defendant has done so.

9 MR. EATON: I think I will withdraw it.  
10 As long as there is a clear charge on the statute of  
11 limitations, I think we can save Mr. MacDonald and  
12 Mr. Macbeth --

13 THE COURT: I take it you are doing it  
14 for your client and not for Macbeth and MacDonald?

15 MR. EATON: That's for sure.

16 What I was thinking about in both the venue  
17 request and the statute of limitations request is  
18 the fact that the jury might conclude that Mr. Schulz  
19 did not go aside from the so-called Christman incident,  
20 where there was an admission in the grand jury, and  
21 that has implications both to the statute of limitations,  
22 because it occurred back in 1970, and for the Southern  
23 District of New York, because it had nothing to do with  
24 the first offering, and in our opinion it had nothing  
25 to do with the second offering. That's what it is



1 jpa

2 addressed to. I don't know if any other defendants  
3 have any other interests in these charges on venue  
4 and statute of limitations, but I think mine would be,  
5 as long as the statute of limitations is made clear,  
6 I don't think we need to go through venue as well.

7 THE COURT: You may be sparing your  
8 friends on the other side prematurely. As you talk it  
9 occurs to me the government is entitled to Pinkerton  
10 under statute of limitations as well.

11 MR. EATON: Then I have a problem.

12 THE COURT: Yes, it seems to me the  
13 same principle applies, unless somebody can explain to  
14 me otherwise.

15 With that understanding you want to press  
16 your venue request?

17 MR. EATON: Yes, if there is a Pinkerton,  
18 then we would --

19 THE COURT: I am inclined to think so.  
20 If there were no limitation questions I would leave it  
21 out. It seems to me it would add a complexity that  
22 would not otherwise be under the total circumstances  
23 of the case. Even if they have a statute of limita-  
24 tions and a venue hurdle that they could legitimately  
25 say might be surmounted by the Pinkerton charge, I think

it is a case for Pinkerton and I would give it.

The way I have to resolve this is to make the government work overnight and ask you to think overnight. You can still withdraw either one tomorrow. But that's the way I think it will come out.

MR. PATTERSON: I was concerned whether Mr. Feldshuh could hear, your Honor.

MR. FELDSHUH: I did hear it, and I did hear --

THE COURT: He just doesn't like what I am saying.

MR. FELDSHUH: Yes. I don't, quite frankly. I too welcome the opportunity of thinking through what your Honor has said overnight. I find that in my judgment, I respectfully submit, a venue to me is a very -- has smackings of a high, technical aspect. On the other hand, statute of limitations falls outside, in my judgment, the scope of technical objections as to where acts may have taken place.

Contrarywise, I think that statute of limitations is a center point, almost substantive concept here.

THE COURT: Look, I absolutely agree with



1 jpa

2 you. I think they are different in that respect.  
3 And that's why I misled Mr. Eaton by an earlier off-  
4 hand remark about venue and Pinkerton being tied to-  
5 gether.

6 As I think about it, though statute of  
7 limitations does have that more substantial quality,  
8 it also implicates Pinkerton, as you can tell by looking  
9 at Mr. Eaton's request to charge. He quite properly  
10 invites the jury to consider whether the government  
11 surmounts a limitations problem via the conspiracy,  
12 Pinkerton theory. He didn't spell it all out at length  
13 and that's what it is. I think he is right.  
14 Therefore, I come out saying that if defendants on  
15 balance, or any of them, want venue or statute of  
16 limitations included in the case I think a fair balance en-  
17 titles the government to its Pinkerton request.

18 MR. FELDSHUH: May I think about it  
19 overnight, sir?

20 THE COURT: Sure.

21 Also evenly balanced is that government  
22 counsel and defense counsel think about and labor over  
23 it tonight and give me your position tomorrow. That  
24 is a proposed charge on venue insofar as you differ from  
25 Mr. Eaton's request.

jpa

5516

I think I will grant the substance of Mr. Eaton's No. 2 upon the statute of limitations, if we give that charge.

I don't know to what extent the charge to the jury ought to contain a list of the alleged acts or misdeeds that come within the limitations period. I am inclined in this case not to give any such list, although I gave one in a relatively recent King case.

I think trying to be consistent, the charge ought to stay general and abstract and it ought to be the government's burden to say how and by what particular things they claim to come within the statute of limitations.

Is there any disagreement on that, Mr. MacDonald?

MR. MAC DONALD: No, sir. We would wonder if your Honor has incorporated the notion that we haven't requested as of yet, that there is affirmative withdrawal from the man who once joins this. The way Mr. Eaton posed those two steps, it sounds as if the government couldn't rely on that continuous --

THE COURT: You better give me a paragraph of that tomorrow. I think you are entitled to that somewhere in this connection. Is it in your Pinker-



1 jpa

2 ton?

3 MR. MAC DONALD: No, sir.

4 THE COURT: It may be that you will want  
5 to add it there.

6 I will deny Mr. Eaton's No. 3 because it  
7 has too many sentences in it that I have to take out.

8 Now, I suppose I ought to grant substan-  
9 tially reouest No. 4, if it is really wanted, and I  
10 guess I have to add the handwriting experts, yes?

11 MR. MAC DONALD: I don't understand why  
12 there is a right to single a witness who, although he  
13 testified that he factually was deceived , then.  
14 went on to explain why the facts, in his opinion, were  
15 relevant to his mental processes in that fashion.

16 THE COURT: On second thought, there is  
17 a point. What do you have in mind in Mr. Murray's  
18 testimony that entitles you to an opinion evidence  
19 charge on him?

20 MR. EATON: I believe, as a matter of  
21 fact, that opinions were expressed by Morse and Woods  
22 as well, your Honor.

23 THE COURT: Opinions about what? They  
24 told what opinions they gave. But opinions about  
25 issues in this case, which opinions?

1 jpa

2 MR. EATON: They were asked hypothetical  
3 questions, Mr. Murray especially, to assume some set  
4 of facts and then to state whether in his opinion  
5 that would have changed the certification.

6 THE COURT: That is right. What  
7 would he have done. That's not the usual expert opinion.  
8 If the car hadn't gone through the red light what would  
9 you have done, is a kind of opinion, but it doesn't  
10 call for the usual expert testimony of opinion instruc-  
11 tion.

12 MR. EATON: I objected to the form of  
13 the questions that were asked of Mr. Murray on the  
14 ground I didn't think they were quite in the proper opinion  
15 wording. I don't think it is proper evidence to  
16 rely on someone who says he didn't know and then say  
17 what would you have done. I think the proper form  
18 is more of a hypothetical question followed by what is  
19 your opinion. I thought that was the point of  
20 those questions although the form was not proper.

21 THE COURT: Now that I listen to it I  
22 don't agree with any of that. I will give an opinion  
23 evidence instruction, if it is wanted, on the hand-  
24 writing experts. That's all. Does anybody want  
25 that?



1 jpa

2 MR. MAC DONALD: The government would  
3 solcit that charge on the handwriting experts.

4 THE COURT: Then I will give that.  
5 But I won't include the accounting things because I  
6 don't think that is what this is about.

7 I will deny request No. 5 for the same  
8 reason I deny the government's correspondign request.

9 6 is denied.

10 7 is granted in substance.

11 I think 8 is covered in substance, though  
12 I guess it will be covered substantially in the words  
13 the government suggested.

14 9 is denied.

15 No. 10, I guess the substance of the first  
16 paragraph will be in but I deny the second para-  
17 graph.

18 11 is denied. I always have to read  
19 Learned Hand's sentence twice and I don't think saying  
20 them to the jury helps all that much.

21 I have an additional request on behalf  
22 of Mr. Hanowitch. This is the one about alleged  
23 false swearing and so on before the grand jury. Whom  
24 do you have in mind?

25 MR. FELDSHUH: Well, we have several in

1 jpa

2 mind, your Honor. We have Frank and Booth, both of  
3 whom swore -- admittedly swore falsely, according to  
4 them, and I want to insure that the fact that they  
5 swore falsely, since both of them stated that Mr.  
6 Yanowitch did not have any knowledge of either their  
7 appearing before the grand jury or their swearing  
8 falsely or intending to swear falsely, that that  
9 fact requires I believe, in order to be fair, a direction  
10 that under those circumstances the so-called false  
11 swearing of them must not fall upon Mr. Yanowitch, not  
12 as to substance.

13 THE COURT: I understand that. I won't  
14 give that. You may argue it to the jury but that  
15 gets into sticky factual things on which there could  
16 be debate. You may argue it. I don't think the  
17 average juror would think that X lies before the  
18 grand jury that ipso facto shows something about Y,  
19 unless there is some evidence of Y's possible partici-  
20 pation. I deny that.

21 Then I have David Stirling's supplemental  
22 request on Nateli, which is denied.

23 A supplemental Nateli request on behalf  
24 of Harold Yanowitch, which is denied.

25 All these more extensive materials relating



jpa

1 to Mr. Schulz and Mr. Phillips concerned with this Nateli  
2 problem, having gone through all that material and the  
3 the government's memorandum, I have concluded that the  
4 government's position on the Nateli thing is correct.  
5 and that the particular kind of reference to specifica-  
6 tions of falsity that Nateli seems to require or favor  
7 should be given with respect to count 2 and not  
8 otherwise.  
9

10 Now, I will from time to time try to  
11 remind the jury that they have to look at each  
12 individual defendant and be aware of the fact that even  
13 in the terms of the indictment certain defendants  
14 are not even charged in connection with certain transac-  
15 tions. I think that applies to Mr. Phillips and  
16 Mr. Schulz, I guess perhaps only to them, and you all  
17 know which paragraphs that thought relates to.  
18 I won't mention any.

19 I will tell the jury to focus on the issues.  
20 That Mr. Schulz is not involved, by and large, with  
21 the Greater Gulf Coast business and that he and Mr.  
22 Phillips, or both, are not involved, according to  
23 the indictment or the evidence, with the union business,  
24 if I remember correctly.

25 But as far as charging the requirement

jpa

of unanimity with respect to the particular specification is concerned, I think the government is right and that really squarely only comes up in count 2 of the indictment. I will try to deal with it in that connection.

Now, there is one problem about the length or bulkiness or cumbersomeness of the charge in this respect. I suppose you could make a fairly long list of specifications under count 2, if you took all of the defendants into account. What I think I will try to do, just to give you guidance for your summations, is mention three or four as illustrative and let you work your arguments into the charge with that forewarning, unless somebody thinks on either side that that is an unfair and insufficient way to handle it. I don't hear any complaints. I think I will do it that way. Let's see how it comes out.

MR. EATON: Your Honor, when you say three or four specifications, are you thinking in terms of one, land sales; two, Greater Gulf; three, union; are you thinking along those lines?

THE COURT: Well, I haven't really finished thinking about it. I want to reexamine both the bill of particulars and the evidence.



1 jpa

2 How is it set up in the bill of particu-  
3 lars?

4 MR. EATON: I really don't think the bill  
5 of particulars is helpful at all, your Honor. It is  
6 a massive list of hundreds of numbers that were wrong  
7 and it didn't come out in this case. I think the  
8 better guideline is paragraphs 10 through 16 of the  
9 indictment.

10 THE COURT: What does the government  
11 think about that?

12 MR. MAC DONALD: We are in general agree-  
13 ment that those examples drawn from those 10 through  
14 16 would focus the jury's attention on this subject.

15 THE COURT: All right, let me see if I  
16 can try that.

17 Now, I have some questions and after a  
18 while we will get through.

19 Mr. Gaynor's question about no inference  
20 from a defendant's failure to take the stand, is that  
21 wanted?

22 MR. GAYNOR: Yes, your Honor.

23 MR. EATON: It is desired by Mr. Schulz  
24 as well, your Honor. I might say that I would like  
25 some language specifically stating that in the course

1 jpa  
2 of their deliberations the jurors should not discuss  
3 that subject or give it any weight.

4 THE COURT: Well, I'll tell them it should  
5 not play any part in their deliberations.

6 MR. EATON: That's good. I would like  
7 that word "deliberations" in there, your Honor. I  
8 think that focuses it.

9 THE COURT: In return let me unnecessarily  
10 mention that in the last year or two I have seen a new  
11 fashion, that I trust will die in its cradle, of defense  
12 counsel informing the jury that it was his decision that  
13 his defendant should not take the stand. I frequently  
14 forget to tell people. But if anybody does that I  
15 will stop him, because of course that's not fair or  
16 correct, and I assume none of you will do that.

17 I take it the position has not changed on  
18 the business of marshaling the evidence. Nobody  
19 has decided --

20 MR. GAYNOR: My position has not changed,  
21 Judge.

22 THE COURT: Since I have not heard from  
23 anybody I will not give a summation of my own but  
24 simply run through the paragraphs and try to remind them  
25 of what the issues were.



jpa

5525

1 I would be helped, I think, if I had a two-  
2 m inute stop on this reassignment business. I assume  
3 that the government's theory is that as maybe one or  
4 two accounting people said the existence of reassign-  
5 ments on so large a scale made the assignment of modules  
6 to specific contracts and the reporting of income based  
7 thereon improper to such a degree that it became  
8 fraudulent. Is that the substance of the government's  
9 theory, or is it more complicated than that?  
10  
11  
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25

T5 pm

mcs

1 MR. MacDONALD: I think the added nuance,  
2 perhaps, that the same witness is mentioned; that they  
3 would have rethought the basic principle if they knew  
4 that contracts were being booked and then later reversed,  
5 because I think it was Professor Mauriello who said:  
6

7 We want to know why it was booked in the first  
8 place. It seemed to tentative.

9 I think the SEC approval, to the extent that  
10 that is what it does, even though if they disavow it,  
11 it is based on a description of a new process which didn't  
12 reveal that history of accounting, and I think Peat,  
13 Marwick & Mitchell would say that they were similarly  
14 misled.

15 MR. FELDSHUH: I don't agree. I think we  
16 start out with the principle, namely, an accounting  
17 principle, to wit, does reassignment of modules standing  
18 alone constitute a wrongful procedure which is like some  
19 kind of fraudulent conduct. I think that all we have  
20 here is that upon the occasion -- let's take, for example,  
21 the Virgin Island situation where that contract collapsed  
22 and there was a reassignment and it was in a very sub-  
23 stantial quantity. That didn't mean, nor is there any  
24 evidence, that the Virgin Islands' contract was a make  
25 believe sort of thing in the first place and that the



1 cs2

2 mere reassignment of modules out, per se and standing  
3 alone, even though it had a volume of the kind referable  
4 to the Virgin Islands, is not to be taken as evidence of  
5 fraud, and I respectfully submit that if the concept is  
6 that the magnitude of reassignment is the question that  
7 makes fraud or lack of fraud, I respectfully submit I  
8 don't see any evidence.

9 THE COURT: Not the reassignment alone, but  
10 the reassignment, Mr. MacDonald is reminding us, coupled  
11 with the omission to disclose it to those to whom it  
12 could well -- depending upon how the jury views the  
13 evidence -- have been material and whether they would  
14 have sanctioned the reporting of income on the completed  
15 contract basis or whatever you call this, if they had  
16 known that, that in many instances the modules were getting  
17 reassigned because the ostensible completion was  
18 repeatedly not sticking -- so that the whole assignment  
19 in that light might have been thought to be improper and  
20 impermissible procedure.

21 MR. FELDSHUH: I would like, your Honor, to  
22 then review the testimony which I hope to do tonight,  
23 because my own mind focuses on the Virgin Islands contract  
24 alone. I don't believe I got throughout the evidence  
25 any magnitude of assignments of the same nature and I

cs3

1  
2 don't think we can point to anything else really in the  
3 evidence showing that full assignment completely out of  
4 one project other than the Virgin Islands. I think that  
5 will raise a jury question. I just want to get your  
6 respective positions on that in case I want to touch  
7 glancingly on it in the charge.

8 I think Mr. Eaton has been the main spokesman  
9 against the Government's thesis. As I understand his  
10 position it is simply that there was nothing wrong with  
11 these reversals and reassignments. That is particularly  
12 clear. There is nothing wrong when they were within  
13 a single accounting period and that the failure to make  
14 any special statement on them certainly can't be deemed  
15 in that light to have been a material or a wilfully and  
16 knowingly fraudulent omission.

17 Is that a fair fix on it?

18 MR. EATON: Yes, your Honor.

19 THE COURT: Again I don't mean to argue your  
20 cases any more than I mean to summarize the evidence, but  
21 when I get to putting this down I may simply want to  
22 remind the jury what the issues are, if they haven't heard  
23 them all from you. I wanted to be sure I had some notion  
24 what your positions were.

25 MR. FELDSHUH: On that reassignment of Virgin



1 cs4

2 Islands, the Virgin Islands was taken out of sales, so on  
3 the issue of disclosure I think there was disclosure  
4 there.

5 MR. EATON: Your Honor?

6 THE COURT: Yes.

7 MR. EATON: For your guidance, if you do feel  
8 obliged to say something to the jury on the subject of  
9 reassignment, I would think that it would be fair to say  
10 that the Government has three hurdles on that issue:

11 One, whether reassignments were important;  
12 and, two, whether the practices were disclosed to the  
13 auditors; and, three, whether the practices were disclosed  
14 in Mr. Schulz' SEC testimony. There are three separate --

15 THE COURT: I certainly don't mean to go into  
16 three. I certainly may go into one or two. Three  
17 is among those many things like false exculpatory state-  
18 ments and evidentiary things that I'm not just going to  
19 pick up the little pieces on. In the 10 hours in which  
20 we are all going to be regaled by you you may do that.

21 MR. MacDONALD: Mr. Eaton singles out the  
22 auditors. The indictment alleged that the history of  
23 mass reassignments was withheld from the auditors and  
24 the SEC and I believe the indictment -- and Mr. Eaton  
25 recognizes that it was the written Schulz description in

cs5

5530

1 July of 1971 of Homex' accounting system which talked  
2 about exclusive assignments to projects which omitted the  
3 history of any, perhaps, tentative nature of such assign-  
4 ments. It was that SEC --

5  
6 THE COURT: Given to whom?

7 MR. MacDONALD: To the Commission at the time  
8 in response to the letter of comment.

9 THE COURT: I see. That I will cover. If  
10 that is what you meant, Mr. Eaton, I misunderstood.  
11 I thought you were talking about the SEC.

12 MR. EATON: I was, but I think Mr. MacDonald  
13 is right.

14 THE COURT: Failure to disclose to auditors in  
15 SEC, I take it, is the nub of the Government's complaint  
16 on this score.

17 My last question, and then you can ask some,  
18 is a small remaining wonderment as to the position on  
19 the allegedly forged commitment letter. I understand  
20 the Government's position. I think that is that Mr.  
21 Phillips caused the signature to be forged and that  
22 Mr. Yanowitch and others must be deemed in all the circum-  
23 stances to have known about that situation..

24 I think I have Mr. Yanowitch's position and  
25 that is that he had no knowledge of any forgery or involve-



cs6

1           ment with any forgery, if there was a forgery, and I  
2           assume that the Sterlings and Mr. Schulz take at least  
3           as strong a position on that.       But I'm not perfectly  
4           clear of Mr. Phillips' position.       I know there was  
5           some specific evidence offered indicating it was the  
6           Phillips' view -- of course that was an obviously phony  
7           letter and yet there is some evidence that, well, really  
8           it is a genuine signature of W. T. Richardson, it is not  
9           forged at all.       Plus, of course, the position that if  
10          it was forged Mr. Phillips didn't know it nor had anything  
11          to do with it.

12                       Where have I gone astray, Mr. Mukasey?

13                      MR. MUKASEY: I don't think your Honor has.  
14                      It is Mr. Phillips' position that, number one, he had  
15                      nothing to do with the forging or with the production of  
16                      the letter, which leaves two possibilities.       Either  
17                      the letter was completely reproduced by somebody else  
18                      and forged, or else it was produced and somehow Richardson  
19                      was induced to sign it in a fashion and Mr. Phillips did  
20                      not participate.

21                      THE COURT: But isn't he on record as saying  
22                      it came down to him from Avon, New York?

23                      MR. MUKASEY: Not at all.

24                      THE COURT: No, he never got it at all.  
25

1 cs7

2 MR. MUKASEY: Correct.

3 THE COURT: I'm sorry, you are absolutely  
4 right.

5 MR. MUKASEY: I thought I had gone to some  
6 pains --

7 THE COURT: I withdraw that. It is another  
8 good reason for me not to marshal the evidence. I would  
9 marshal it incorrectly.

10 I guess I generally have a sense of that  
11 position to the extent I need it.

12 What have we omitted? What else do we need  
13 to deal with at this point?

14 MR. PATTERSON: Your Honor, I'm sure that your  
15 Honor is covering this in the charge, but I have been  
16 concerned that because all these people are employees of  
17 the same corporation and because some members of the jury  
18 are not particularly well educated or versed in these  
19 matters, I was wondering if your Honor will make clear  
20 the fact that they are employees of the same corporation  
21 per se is no indication that they entered into a con-  
22 spiracy or are guilty of the charges.

23 THE COURT: I don't see any strong objection  
24 to it. I just wonder whether singling that out really  
25 helps the defendants. If you want it and nobody objects,



cs8

1 I'll put it in.

2 Are there any other views?

3 MR. GAYNOR: Can we reserve that one, your  
4 Honor? I would like to think about it.

5 THE COURT: I don't want to reserve too much,  
6 but, yes, I will. I'll put it in unless somebody tells  
7 me to take it out. I do suggest that defense counsel  
8 particularly ought to think about this. I'm not a  
9 defense lawyer, but I have a gut feeling that it does  
10 more harm than good from the viewpoint of a defendant  
11 getting a fair charge, but if no defendant wants to take  
12 it out and the defendant Phillips wants to put it in, I'll  
13 put it in.

14 MR. FELDSHUH: I would like to think about  
15 that. I'm inclined to agree with your Honor.

16 THE COURT: Let me know tomorrow. If any  
17 defendant objects to it I will take it out.

18 MR. EATON: I don't particularly like it, your  
19 Honor.

20 THE COURT: Is that an esthetic expression?

21 MR. EATON: No, I object to it.

22 THE COURT: Then I won't give it, Mr. Patterson.  
23 I'm going to say the fact that people associate together  
24 in any way doesn't make any conspirators, and that covers  
25

cs9

1 friends, fellow members f the Lions Club, and I don't  
2 think there is any member of the jury who does not know  
3 if you work for the same company you are not necessarily  
4 members of a conspiracy.  
5

6 MR. PATTERSON: Some people might feel that in  
7 the selling of stock by a particular company everyone  
8 might be associated.

9 THE COURT: I understand. If all the defendants  
10 get together on a position tomorrow and want it back in  
11 I'll put it back in. You can bounce it back and forth  
12 overnight and see where you come out.

13 Is there anything else we need to talk about?

14 MR. MACBETH: The Government plans to use a  
15 chart in summation. I was going to show it to defense  
16 counsel now and hopefully we can decide any problems  
17 ourselves. I just let you know that there is a chart  
18 here. It deals with the payments of loans at Central  
19 Trust Company in Rochester.

20 THE COURT: Why don't you talk about it over-  
21 night and if there are any objections I will hear them  
22 tomorrow morning.

23 Anything else, gentlemen?

24 MR. GAYNOR: I'm going to object to this.

25 THE COURT: On what ground?



cs10

MR. GAYNOR: I would like to think about the grounds. One of the grounds is really at this stage of the game it takes on a super importance for use in summation when it wasn't used during the trial.

THE COURT: Think of some other ground.

MR. GAYNOR: Yes, I'll think about it overnight.

THE COURT: If I don't hear anything about that I will assume that it is permissible for the Government to do that.

In light of all of this I think we had better get together about 9.15, because I think you all ought to be able to start your summations without being interrupted any more than necessary, so talk about it overnight. We will all get here at 9.15 and see if there are any final problems to be cleared up.

Good night.

(Trial adjourned until Wednesday, January 26, 1977, at 9.15 o'clock a.m.)

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6

1 jpa

2 to Mr. Schulz and Mr. Phillips concerned with this Nateli  
3 problem, having gone through all that material and the  
4 the government's memorandum, I have concluded that the  
5 government's position on the Nateli thing is correct.  
6 and that the particular kind of reference to specifica-  
7 tions of falsity that Nateli seems to require or favor  
8 should be given with respect to count 2 and not  
9 otherwise.

10 Now, I will from time to time try to  
11 remind the jury that they have to look at each  
12 individual defendant and be aware of the fact that even  
13 in the terms of the indictment certain defendants  
14 are not even charged in connection with certain transac-  
15 tions. I think that applies to Mr. Phillips and  
16 Mr. Schulz, I guess perhaps only to them, and you all  
17 know which paragraphs that thought relates to.  
18 I won't mention any.

19 I will tell the jury to focus on the issues.  
20 That Mr. Schulz is not involved, by and large, with  
21 the Greater Gulf Coast business and that he and Mr.  
22 Phillips, or both, are not involved, according to  
23 the indictment or the evidence, with the union business,  
24 if I remember correctly.

25 But as far as charging the requirement



1 jpa

5547

2 Mr. Eaton's requested instruction on the statute of  
3 limitations with slight editorial changes and I will  
4 add on this withdrawal paragraph some place.

5 Is there any objection to that?

6 MR. MAC DONALD: No, sir. Your Honor  
7 is raising the charge and it reminds me I think I neglected  
8 to ask for a charge with respect to advice of counsel  
9 and accountants and the necessity to make full disclosure  
10 in obtaining such advice. There is a boiler plate  
11 which we would ask leave, if your Honor would consider,  
12 to supplement our request in that regard if your charge  
13 didn't have some such --

14 THE COURT: I don't have anything in there  
15 about that. Do the defendants plan to argue -- I  
16 suppose some of them do -- reliance on the advice of  
17 counsel and/or accountants?

18 MR. GAYNOR: I do, your Honor.

19 THE COURT: Well, you better give me  
20 that boiler plate. It is probably more accessible  
21 than mine.

22 I will grant that, assuming, as I would  
23 hope, in line with the usual motions, and the defendants  
24 understand that I will charge that good-faith reliance  
25 may defeat any claim of criminality provided that the

1 experts upon whom reliance is claimed were given  
2 complete accounts of the facts involved in the trans-  
3 action. That's what you are talking about, yes,  
4 Mr. MacDonald?  
5

6 MR. MAC DONALD: Yes, sir.

7 MR. GAYNOR: And whether or not they  
8 were, your Honor, is a question of credibility.

9 THE COURT: No. I am not going to  
10 add credibility at every point in the charge, but I  
11 will charge generally on credibility.

12 MR. GAYNOR: I would ask if your Honor  
13 would do that in this particular instance.

14 THE COURT: Let me think about it. I  
15 will make a note of it.

16 MR. PATTERSON: Your Honor, with respect  
17 to Defendant's Exhibit 485, which I have just inspected,  
18 it appears certain of the pages therein are not  
19 in sequence and according to the government's number  
20 and do not have numbers. If, of course, this is an  
21 accurate representation of the exhibit we would have no  
22 objection. But it does appear that there are certain  
23 pages in there that do not bear numbers and I raise  
24 the question because I haven't seen the original docu-  
25 ment.



1 cs8

2 ized letter that his lawyer had worked over back in June,  
3 four days after the sale of the land. It amounts to  
4 a promise to enter into a contract at a price some time  
5 to be determined by the published prices for those 300  
6 units. It is a letter of intent and is conditioned on  
7 River Bend getting financing. It is part and parcel  
8 of, despite Mr. Stirling's testimony otherwise, the sale  
9 of that land to Peter Thun and through Peter Thun and  
10 the benefits flowing up ward to Hollyrood Park Associates.

11 On October 1, 1969, the registration state-  
12 ment was filed for the original sale of securities  
13 by Stirling Homex Corporation. That registration  
14 statement was signed by -- or the power of attorney  
15 attached to it by Mr. Schulz, William Scirling and Harold  
16 Yanowitch.

17 With respect to those two land transactions  
18 it said merely that 18 per cent of income that year arose  
19 out of the sale of land, and this is the letter. In con-  
20 nection with that letter Mr. Thun signed, even though  
21 David Stirling said it was unrelated. It was then said  
22 the larger parcel was purchased by a developer who subse-  
23 quently entered in an agreement with the company to  
24 purchase housing on the land.

25 In October of 1969 that letter was part and

1 jpa3

2 employees and not special stock list. Individually  
3 and not Marine, we suggest that it suggests that it  
4 is not Marine who is doing the financing on this.

5 Then he wrote "From D.S.," David Stirling,  
6 "to K. Langone," who you know to be president of  
7 Pressprich. "Eight checks came from C.T.," Central  
8 Trust Company.

9 Now, you may find that this is a con-  
10 temporaneous note by Harold Yanowitch showing that  
11 he knew and wrote and recorded for posterity's sake that  
12 eight checks from the Central Trust Company were  
13 forwarded from David Stirling to Ken Langone to  
14 satisfy the purchases by those eight men.

15 Let me pause and comment about there  
16 being eight. Lane Kirkland is No. 8. Seven men  
17 are named in this indictment, seven men who are members  
18 of the carpenters union, a union who had worked negotiat-  
19 ing contracts, contract disputes or possible disputes  
20 with the Stirling Homex Corporation. Those are the  
21 men whose stock interest in the company, if obtained  
22 by these means, ought to have been somehow disclosed  
23 to the investor if it was -- if he was to have a fair  
24 reading of what the true labor relations of the company  
25 were.



jpa4

1           The Seafarers International, International  
2 Association of Machinists, AFL-CIO, executive officers  
3 who had no such arm's-length contractual dealings,  
4 are not in the indictment where the grand jury has charged,  
5 and if Mr. Gaynor stands up here and starts looking at  
6 you in the eye and starts talking about Lane Kirkland,  
7 make sure he answers the question, Lane Kirkland is not  
8 in the indictment.       Lane Kirkland is No.8.     It is  
9 the seven people who are improperly withheld from the  
10 investment.  
11

12           By the way, one of these pieces of paper  
13 had Mr. Stirling's secretary's name, Sue Flaherty.     I  
14 believe he recognized her signature, or rather her  
15 name, and turned to Sue Flaherty on the early draft of  
16 this special list with the amounts of stock that were  
17 changed, depending upon, I suppose, whoever was  
18 allocating that number of shares.

19           I skipped over it, but on February 27, 1970  
20 Pressprich gave a check to David Stirling, Jr. for  
21 \$1.68 million and a check to his brother for \$1.7  
22 million.

23           I pause now to ask you to reflect on the  
24 testimony with respect to such sums of money.     I ask  
25 you to ask yourselves whether there is any human

1 jpa 5581  
2 it is proper to try and get contemporaneous ones or  
3 take them from 20 years before and after, and then in  
4 the final analysis go back and take a look at them  
5 yourselves, go back and see if this was an extremely  
6 clever forgery where the forger couldn't make the "t"  
7 half as long as the "t" he was trying to copy, or  
8 whether you believe from looking at it that it looks  
9 just like a signature of David Stirling, with the  
10 expected variation which all of the experts say  
11 human beings have in their own handwriting, then you  
12 decide with respect to Mr. Stirling's testimony  
13 that he never signed such a letter.

14 It should not be credited. It should  
15 not be credited because existing bank records demon-  
16 strate that it was there. The testimony of Mr.  
17 Marshall shows that it was so listed, whether that  
18 testimony is exactly what you would expect a banker to  
19 do in making a \$200,000 loan, and then resolve the fact  
20 question, which is your job, as to whether or not Mr.  
21 Marshall's interest in the outcome of this action  
22 or Mr. Stirling's interest in the outcome of this action  
23 might suggest some motive to fabricate.

24 What happened in the summer -- also in  
25 June, 1970 -- the Raseac principals had gotten their



1 jpa

5595

2 David and Willima Stirling as an inducement, etc., etc.  
3 The nondisclosure of their integral relationship in  
4 bringing that payment to pass was something that the  
5 auditors were entitled to know in trying to decide that  
6 they would agree that these were really collectable  
7 amounts.

8 It is not the collectability of a little  
9 sum of \$25,000 that is important. That is not the  
10 reason they hit it. They hit it because somebody  
11 would say, "Why was it a sale in the first place if the  
12 man only made one payment shortly after the original  
13 down payment and hasn't made any more?" Maybe it was  
14 being viewed as an option by the man. Maybe he  
15 didn't have in mind making the payments as they came  
16 due in time and as time progressed.

17 A few days later Peter Thun did sign the  
18 confirmations and there was no occasion to reexchange  
19 the check.

20 One thing you should consider when Mr.  
21 Gaynor addresses himself to this point: the question  
22 we asked Peter Thun on redirect at the end of that  
23 afternoon.

24 "Mr. Thun, did you ever take out your  
25 checkbook and pay \$90,000 or \$23,000 or two cents

1 jpa

2 against this debt?

3 He said no, he didn't. That speaks volumes  
4 about whether that was truly a receivable that was  
5 going to be collected so far as the man who had the risk  
6 felt.

7 In passing I will note that David Stirling  
8 had forgotten in his testimony originally, until shown,  
9 that he received written reports from Judge Reuben Davis,  
10 from Santa Lucia, from others, about which customer  
11 was being asked to confirm sales. He reviewed and  
12 kept tabs on it, each step that the auditors followed,  
13 and in getting customers to sign confirmations.

14 You may find that in experience the  
15 chairman of the board ordinarily doesn't give such close  
16 attention to the ministerial steps of an audit.  
17 You may find that he had knowledge that accumulates and  
18 grows, that you will see memoranda that Schulz reports  
19 to him every step the auditors were taking, every  
20 possible question they might anticipate being asked.  
21 You may find that he was most knowledgeable about the  
22 financial aspects and evidence in this corporation.

23 October 30, 1970 comes. That's the end  
24 of the first quarter for the next fiscal year.  
25 Telephone rings down at Kesel's department and Schulz



mcs

AFTERNOON SESSION

(3.15 p.m.)

(Jury present.)

THE COURT: All right, we are ready for rebuttal.

MR. MACBETH: Yes, your Honor.

Judge Frankel, ladies and gentlemen of the jury;

I'm going to speak to you briefly about William Stirling and I'm going to address myself first to Mr. Gaynor's contention that William Stirling was essentially a man who worked in the plant and was only interested in the manufacture and installation of the modules and had virtually nothing to do with the facts alleged in the indictment.

I will start by taking you back to the initial presentation that defense made in this case and that, you will remember, was the film that you saw, "It Can Be Done."

You probably remember that Richard Levering testified that he had taken the proposal to have that film to William Stirling and it was William Stirling who approved that film and in the memo that Levering sent to Mr. Stirling he described that movie as an excellent sales promotion, and it has been said here that the film

2 put the company's best foot forward.

3 The film helps you understand some of the  
4 things that this case is not about. The Government isn't  
5 contending that there was a phantom plant in Avon and no  
6 modules were ever sold in Avon. You couldn't raise  
7 \$40 million on Wall Street in the course of two years if  
8 that was the case.

9 And there isn't anything wrong with putting  
10 your best foot forward when you are making just a sales  
11 promotion. But that film was used for much more than  
12 that. You remember Mr. Clayton saying that it was shown  
13 to securities analysts, prospective investors, bankers,  
14 people in the financial community. When you deal with  
15 them you have a responsibility to say more about the  
16 company, to put out all the relevant and material facts  
17 so the public can see them, and William Stirling didn't  
18 make sure that that was done in that film. There is  
19 nothing in that film about the company's land deals.  
20 There is nothing in that film about the company's dealings  
21 in Mississippi.

22 There is in evidence a large book full of  
23 the company's press releases. Again Mr. Levering  
24 described to you how the financial releases, the other  
25 releases he worked on, were approved by William Stirling.



1  
2           You can, as you look through that book, see  
3 a large number of the releases that deal directly with  
4 financial matters, announcements of the company's  
5 earnings by quarter and announcements of the company's  
6 major contracts.

7           If you look through those releases you will  
8 see that there isn't any release that deals with the  
9 nature of the company's land sales.     There aren't any  
10 releases there that point out that in a seven-month  
11 earning period something in the order of 40 percent of  
12 the company's sales to were one customer, the Greater Gulf  
13 Coast Housing Development Corporation.     There isn't  
14 even a press release announcing the contract with Greater  
15 Gulf Coast.

16           All that you will find in there is a press  
17 release on Greater Gulf Coast's own letterhead announcing  
18 its own formation and the fact that it is going to start  
19 to look around for planning proposals.     The press  
20 release was put out well after the 800-unit contract and  
21 the 5000-unit contract had been signed.

22           Mr. Gaynor told you yesterday that it was with  
23 Mr. Wren that Mr. Levering worked on those press releases.  
24 He failed to remind you that the task of working with Mr.  
25 Levering was assigned by Mr. William Stirling.     The

cs4

1  
2 release is like the one on the plan in Mississippi.  
3 He consulted with Mr. William Stirling at the direction  
4 of the president of the company, Mr. William Stirling,  
5 and Mr. Levering also testified that William Stirling told  
6 him, Mr. Levering, to work with Mr. Wren.

7 Another part of William Stirling's work was  
8 working with the public in the release of news. He told  
9 you about the incident as to the financial reports of the  
10 company for the year being sent off to the typesetter and  
11 in them was the statement that the company had more  
12 than \$3 million as an income tax refund receivable, and  
13 that that footnote went on to point out that the company's  
14 operations had resulted in a tax net operating loss  
15 sufficient to eliminate 1969 and 1970 fiscal years taxable  
16 income.

17 All of those copies of that financial statement  
18 were collected, as best they could be, by William  
19 Stirling. What appears in that annual report is a much  
20 softer piece of language. There is no suggestion there,  
21 nothing at all, about any losses. The company  
22 reported more than a million dollars less as an income  
23 tax refund receivable, but it was decided to do that and  
24 have that softer language in the footnote, to have no  
25 suggestion about losses from the company and William



cs5

1  
2 Stirling did everything he could to make sure that that  
3 decision was implemented.

4 There are a number of other points, of course,  
5 where you can see William Stirling's continuing activity  
6 in the kind of information that the company let out.  
7 The work on the annual report was perfectly obvious.

8 It is also true, if you look at the work with  
9 the underwriters and the kind of information that the  
10 underwriters asked for. Their attorneys went to  
11 Stirling Homex with a list of questions, of things they  
12 wanted to know.

13 Government's Exhibit 807, and the approval  
14 for what they would be told and what they wouldn't be told  
15 has both William Stirling's stamp on it and his big S on  
16 the cover.

17 When the Peter Thun deal was completed William  
18 Stirling signed off there giving up his part of the  
19 Hollywood Park stock in return for the settlement with  
20 Thun that was needed for the auditors.

21 Of course, William Stirling was active in the  
22 plant. You can see that partially from the fact that  
23 Samuel Ruggiano testified that he had had a conversation  
24 with William Stirling and David Stirling about buying  
25 Stirling Homex stock; that they were urging it on him,

1 pushing it on him back in the spring of 1970.

2  
3 And of course he was there throughout the labor  
4 loan deal. You can see that from the chart and see it  
5 most transparently from the expense voucher, Government's  
6 Exhibit 319 that he filled out in relation to that  
7 first \$11,500 payment. There he describes what those  
8 expenses were for, and the entries were "Travel and  
9 entertainment of union representatives relative to new  
10 contracts; travel and entertainment meals relative to  
11 representation of union locals, meeting with national  
12 union representatives."

13 Hardly a document that tells more clearly  
14 exactly what it was that was in William Stirling's mind  
15 when he was thinking about those labor payments and taking  
16 care of those loans. Of course, his signature on the  
17 letter, the hold harmless letter, that he and his brother  
18 gave out at the time that the loans are taken over by  
19 William Shea.

20 I want to touch quickly on Mr. Gaynor's conten-  
21 tion that William Stirling and his brother didn't take  
22 very much in the way of money out of this company. Of  
23 course, it is conceded that William took out \$1,700,000 at  
24 the time of the Pressprich offering, the sale of his  
25 stock in that offering.



1  
2 I ask you also to look at the 1971 Merrill  
3 Lynch prospectus and you'll see there that William  
4 Stirling and David Stirling are being paid \$125,000 a  
5 year by the corporation. You remember too that David  
6 Stirling testified from the stand that he and his brother  
7 in the fall of 1971 took out approximately \$500,000 apiece  
8 from the sale of their stock, and in connection with that  
9 I draw your attention to Government's Exhibit 368 which  
10 lists out the real legal limits as to how much money  
11 William Stirling and David Stirling could take through  
12 the sale of their stock without having to go through the  
13 whole process of a registration statement.

14 And then finally may I point to Government's  
15 Exhibit 356. Mr. Yanowitch's writing on it deals with  
16 the proxy statement in the fall of 1971 and there is a  
17 statement there that three senior members, the management,  
18 are drawing well in excess of their contract figures  
19 and there is the suggestion that a new contract should  
20 be written.

21 You know, of course, that the expense accounts  
22 were not generally written out by William Stirling and  
23 David Stirling and there is a very real open question  
24 there as to how much more money really was being taken  
25 out through the expense accounts.

1  
2 William Stirling was the president of the  
3 company and he was in the acts that are alleged in the  
4 indictment from the beginning to the end, from the time  
5 he had the conversation with Ruggiano about buying the  
6 stock in the spring of 1970, right through that final scene  
7 with William McCann after the bankruptcy when McCann brings  
8 the vouchers, those very payments over to David Stirling's  
9 house, goes into the room and there is William Stirling,  
10 David Stirling and Edwin Schulz and Harold Yanowitch and  
11 some fifth person that Mr. McCann can't remember and he  
12 hands over the vouchers to David Stirling and he goes out  
13 to the hallway and he is given some money and he goes  
14 off in the car of William Stirling's wife, and I think if  
15 you look at the facts in this case carefully you'll see  
16 that the president of this company was not a bit player in  
17 the drama that you have seen he told from the witness  
18 stand here, but that he was a principal actor in it,  
19 significantly involved in a wide variety of the company's  
20 operations, particularly its relationship to what was  
21 disclosed and what was disclosed to the public and that  
22 there isn't any question but that he is properly in this  
23 indictment and that he should be convicted.

24 Thank you.

25 MR. MacDONALD: Judge Frankel, Madam Forelady,



jpa3

CHARGE OF THE COURT

(Frankel, J.)

THE COURT: Good morning, ladies and gentlemen.

Now we come to the ultimate point in this case toward which everything else has been addressed, the time for your critical function, the time for a decision.

As you have been told from time to time by counsel and by me, you are, and it is not an expression but a fact, the sovereign judges of the facts of this case. My responsibility at this point is to convey to you the instructions on the law. I am sure you know they are not instructions that I create. They are the best possible effort that counsel and I could make to put together for you the rules that govern cases of this kind, the rules which on the evidence that has been placed before you define the disputed issues that you are to resolve.

The vital and central task in resolving those issues is for you to seek the truth about the events that give rise to this proceeding. You are to seek the truth, as we have all repeatedly reminded you-- but this is the time for recalling all the reminders --

1 jpa4

2 you are to seek the truth from the evidence; the testimony,  
3 the many exhibits that have been made before you and  
4 some things that have been stipulated, agreed to, are  
5 the matters that you may and that you should consider  
6 in reconstructing the happenings that led to this  
7 prosecution.

8 You will remember the things that are not  
9 in evidence. The indictment that's been placed before  
10 you as a convenience in your following these instruc-  
11 tions and for your reference in the jury room, the  
12 indictment isn't evidence. It simply is a reminder  
13 of the accusations made against these defendants of  
14 which they are presumed to be innocent. The things  
15 that the attorneys have said to you, arguing what they  
16 say the evidence showed and what you should infer  
17 from it, those things are not themselves evidence.  
18 Nothing that I say to you here will be evidence, ob-  
19 viously.

20 I won't burden you with another attempt  
21 to sum up or marshal the facts, which is sometimes done  
22 in a judge's charge at the end of the case. You  
23 have heard some 10 hours of summation and that is  
24 ample for the purpose.

25 As we go along in these instructions, which



1 jpa5

2 regrettably will take some time, I will be making refer-  
3 ence to some facts. They will be very partial  
4 references. They will be only for illustrative pur-  
5 poses. I will not attempt at any point to state fully  
6 the positions on either side because you have heard  
7 them argued at great length and, I might say, with  
8 great skill by all these lawyers. So I will surely  
9 be leaving out some of the contentions or assertions  
10 on one side or the other, and you must understand that  
11 it is the full range of those assertions and the evidence  
12 to which they relate that you are to decide.

13 When I refer to the contents, pro and con,  
14 it will be merely to remind you of them, to try to set  
15 them in the context of the case to help you proceed  
16 toward a decision. If I give you three points on  
17 one side and two points on the other in any of these  
18 illustrations, that is a matter obviously of no conse-  
19 quence.

20 Nothing that I say may or should suggest  
21 to you any view of mine on how you are to decide the  
22 questions that are for you to decide. So far as we  
23 are all concerned, and it is a fact and most judges  
24 try to follow it, I have no views on these issues  
25 because they are for you.

1 jpa6

2 Similarly, if in the course of the pro-  
3 ceeding there have been rulings for or against one  
4 side or the other, you will realize that at this point  
5 that is of no consequence whatsoever. If sometimes  
6 in argument back and forth we lawyers, which is  
7 what we all are, become contentious or even testy,  
8 that is now of the greatest possible insignificance.  
9 This is not a game; it is a serious business.

10 I think it has been among one of the  
11 most orderly trials of such a length that I have seen.  
12 That is a tribute to the lawyers who conducted it.

13 At this point none of us is interested  
14 in which lawyer is best or worst or whatever. The  
15 effort, and your effort, is to do justice between the  
16 parties and that is the serious business in which rul-  
17 ings and contests and the contentiousness have no  
18 further part.

19 You are to approach your task with  
20 objectivity, without sympathy and without bias, as  
21 your oath requires, with all the detachment and  
22 neutrality and rationality that you can collectively  
23 muster for this serious business.

24 In response to that indictment that you  
25 have before you all of these defendants pled not



1 guilty. That means that from then on and through  
2 this time and through your deliberations the burden  
3 has been upon the government to prove guilt beyond a  
4 reasonable doubt before any defendant may be con-  
5 victed on any of the charges against him. Whether  
6 that burden has been borne is not to be judged  
7 mechanically by the length or amount or volume of the  
8 evidence on one side or the other, it is to be judged  
9 by taking all that evidence now together synthesizing  
10 it and making a judgment about its overall meaning and  
11 effect upon your collective decision-making minds.  
12 In the end, after you have put it all together, you  
13 are to decide whether or not, on any count in this  
14 indictment, the requisite degree of proof has been  
15 satisfied.  
16

17 As a corollary to that basic principle,  
18 the burden of proof is on the prosecution. It is  
19 also the law that a defendant in a criminal case  
20 with us is not called upon to prove his innocence.  
21 A defendant does not have to present any witnesses or  
22 introduce any proof of any kind in a criminal case in  
23 our system. Obviously he may. You have heard  
24 such evidence in this case. But a defendant comes  
25 here, as I have said, presumed to be innocent.

1           jpa8  
2           That presumption stays in his favor throughout the  
3           case and through your deliberations in the jury room.  
4           That presumption, by itself, is enough to require that  
5           you acquit a defendant until or unless you are convinced  
6           of his guilt beyond a reasonable doubt.

7                     Having no burden to present any evidence,  
8           a defendant has the absolute right, in his own judgment,  
9           with the advice of counsel, to decide whether or not  
10          he will take the witness stand.

11                    As you know, three of the defendants here  
12          havemade the decision to testify and two have not.  
13          As to the latter two, I instruct you that in order to  
14          preserve their constitutional rights, and the con-  
15          stitutional rights of all defendants, you must draw no  
16          inference of any kind against them because of their  
17          failure to take the stand.



T2 am 1

mcs 9

2 That is not a subject for discussion or for  
3 speculation. It should play no part soever in your  
4 deliberations on this case.

5 Now, you have heard over and over again from  
6 me and from the others of reference to the fundamental  
7 conception, the requirement of proof beyond a reasonable  
8 doubt, and it is essential that instructions in a criminal  
9 case include some effort to give meaning to that very  
10 basic notion.

11 What we mean in this connection when we speak  
12 of a reasonable doubt is, first off, what the words--  
13 literally seek to convey. We mean a doubt that has its  
14 foundation in your reason addressed to the evidence or  
15 lack of evidence in a case that has been placed before  
16 you. It is a doubt that has substance and is not merely  
17 shadowy or conjectural. It is a doubt, if I may some-  
18 what repetitiously say it, that arises from your collective  
19 judgment and your common sense and your experience and  
20 your reason all focused on the record of evidence in this  
21 case. It is not an excuse to avoid performing an  
22 unpleasant duty. It is not a basis or guise for extend-  
23 ing sympathy for any defendant. A reasonable doubt is  
24 the kind of doubt that would cause a prudent person to  
25 hesitate before acting on some matter of consequence to



1 2cs 10

2 himself or herself.

3           Saying that same thing at greater length, if  
4 you in your own life have a serious decision to make and  
5 if you proceed to review coolly and rationally all the  
6 factors that have a bearing on that decision, and if at  
7 the end of that process you find yourself beset by  
8 uncertainty and unsure of your judgment, you have a reason-  
9 able doubt.     And the converse of that is also true:

10           If you have such a decision to make and you  
11 proceed to such a detached and objective review of the  
12 factors that bear on the decision, and if at the end of  
13 that process you have no such uncertainty or reservations  
14 as I have mentioned, then you don't have a reasonable  
15 doubt.

16           Now, proof beyond a reasonable doubt does not  
17 mean proof beyond any conceivable doubt or proof to an  
18 absolute certainty.     If it meant that then nobody could  
19 ever be convicted in any criminal trial in our courts,  
20 and I say that because, as I think I have told you before,  
21 the purpose of a criminal trial is to resolve issues of  
22 fact -- issues of fact about things that lie in the past,  
23 and it is in the nature of such issues logically that  
24 they cannot ever be resolved to an absolute certainty or  
25 beyond any doubt whatsoever.     So, we rely on the law



1 throughout in criminal as well as civil casesd on  
2 probabilities, not certainties. Nevertheless, in the  
3 end the point and purpose of these instructions on the  
4 idea of proof beyond a reasonable doubt is to make very  
5 clear to you that in a criminal case the burden of proof  
6 upon the complaining party, on the prosecution, is a  
7 very high one and that you may convict in the end only if  
8 your minds are free of the kinds of reservations, the kind  
9 of uncertainty I have been talking about.  
10

11 Now, with those basic principles in view we  
12 move toward the issues that you will have to decide and I  
13 say we move toward them because in a way this is a kind  
14 of funnel approach to these problems. I'm going to speak  
15 in general terms some more and then finally come specifi-  
16 cally to the issues for decision in this case.

17 You have the indictment and I am going to  
18 summarize it with you and paraphrase it some so that you  
19 have a sense of the setting which you surely have already,  
20 but perhaps a more focused sense of setting in which your  
21 questions arise.

22 Now, that indictment contains nine counts in  
23 legal terminology. That means nine charges of crimes  
24 naming each of these defendants. Although there are  
25 nine separate counts and they will be the subject of



1 4cs 12

2 individual decisions by you, you also realize by now  
3 that charges tend to a very large degree to overlap and  
4 repeat each other because they all center on an alleged  
5 scheme or plan or course of an allegedly fraudulent conduct  
6 and in each of the counts that course of alleged misconduct  
7 is repeated and then placed in terms of a specific federal  
8 statute which contains elements varying from the others  
9 which is alleged in that particular count to have been  
10 violated, and that I trust will also be clearer to you  
11 when these instructions are over.

12 As I say, all of the five defendants are named  
13 in all of the nine counts. But you also know that not  
14 all of them are charged or chargeable with participation  
15 in all aspects of the allegedly criminal behavior.  
16 Again, as we go along it is hoped that your understanding  
17 will be sharpened a little as to the necessity for focusing  
18 separately on each of these individual people in this case  
19 and considering separately the particular charges which  
20 concern him as well as the charges that do not concern  
21 him.

22 The indictment in its organization begins  
23 with an introduction. It tells you who the people are  
24 and then it proceeds to its main assertions, beginning at  
25 the bottom of page 2 where it has a heading "The Fraud



5cs 13

Scheme," and then it proceeds to charge an overall course of conduct allegedly designed to mislead and defraud and deceive purchasers of the Stirling Homex stock, the shareholders of the company, officers, directors and outside auditors, all, as I say, in connection with the offer and sale of the common and preferred stock of the corporation.

Then moving to the heart of the matter, Paragraph 9 on page 3 alleges that the object of the scheme was to deceive investors in Homex securities by fraudulently inflating earnings and concealing or falsifying adverse information about the company's operations.

And then under a heading "III. The Means By Which The Fraud Scheme Was Carried Out," we come to seven key paragraphs which play over and over again, the central role really in each of the nine counts of the indictment, and those allege a series of transactions and representations by which it is charged that the defendants reported and represented falsely inflated amounts of net income through false reports of profits on various transactions and also through the concealment of facts that an investor or an auditor would have to know to have correct understanding of the business situation of Stirling Homex and of the risks and benefits that might be anticipated in the purchase of the stock of that corporation.



mcs 14

1  
2 Then Paragraphs 10 through 16, beginning on  
3 page 3, go on in one or more paragraphs for each to deal  
4 with the kind of specific chapters or episodes that you  
5 have heard about, the land sales, the Gulf Coast problem,  
6 the union officer business, and so on, and again I want to  
7 review those for you just so you will have together a  
8 picture of this indictment and especially these fundamental  
9 assertions that underlie the whole of this case.

10 Now, Paragraph 10 involves, as you will see,  
11 four of the defendants -- Mr. Phillips is not mentioned in  
12 Paragraph 10 -- and this asserts that the four who are  
13 named all participated in one way or another in 1969 in  
14 a scheme to show false profits and falsely inflated  
15 revenues through the arrangement of two land sales that  
16 were not genuine market transactions but were in various  
17 ways, according to the allegations, artificial transac-  
18 tions characterized by artificial elements that made it  
19 improper and misleading to report the sales prices on those  
20 transactions as income of the corporation.

21 (Continued on next page.)  
22  
23  
24  
25



ljpa 15

Specifically, the indictment charges, with respect to one sale that you will recall involving Mr. Peter Thun and another sale to a corporation called Raseac Associates, that both sales involved artificial prices and certain side promises and agreements given to the buyers, including assurances that they would be guaranteed against any losses.

It charges further that these sales involved minimal down payments with postponement of the obligation to pay the remainder of the purchase price for long periods. It is charged that the sales were to financially weak corporations that could not have paid the purchase price and should not have been expected to be able to pay the purchase price, so that the profit being reported, or the income, the price, being reported for 1969 should have been known and must have been known to be unreal and very unlikely ever to be realized.

On the particular charges in that paragraph 10, and on all the charges throughout the allegations of this indictment, the defendants flatly deny the accusations against them. Insofar as prosecution witnesses have testified to facts that appear to support those accusations, the defendants contend,



jpa 16

among other things, that at least many of those witnesses must have testified falsely for reasons of their own, such as a hope for freedom for themselves from prosecution by providing these defendants as targets for prosecution instead of themselves. More specifically and affirmatively on the charges in paragraph 10, the defendants argue that the sales were essentially normal types of transactions, that the prices were not artificial, that the down payment arrangements were within the range of normal and customary deals of this nature, that the use of shell corporations was likewise a normal and typical practice that involved nothing wrongful and no deception or fraud of any kind.

As to the allegations and testimony of witnesses that there were guarantees against loss, the defense testimony has been that those charges and that testimony are absolutely false.

Paragraph 11 goes on to deal with the same 1969 land sale and the same four defendants, and charges them with wrongdoing, with deception in documents filed with the SEC and other documents distributed to shareholders which omitted to disclose that the land sales were not in fact being consummated,



jpa 17

omitted to disclose that in one of the transactions people affiliated with Stirling Homex -- and that is Mr. Bernard Frank and others -- were being substituted as owners of the purchasing shell corporation and were again being guaranteed against losses and were beign provided with Homex funds with which to make the purchase payments. And finally, that these documents given to the SEC and others omitted to show that the payment obligations on the sales were in fact not collectible.

Again, the denials and the affirmative positions of the defendants continue. There is a denial of any deception or wrongdoing. There is the position that the sales were normal and that the reporting of the sales prices, insofar as they were reported, was proper and in no way deceptive.

Paragraph 12 deals with another alleged wrongful land sale, wrongful in the setting of this case. It is claimed to be similarly deceptive in its character, and this one now, you know, relates to the transaction of the 57-31 Corporation.

Here, as you see from the indictment and will recall from the evidence and the arguments, the fundamental character of the government's position is



jpa 18

essentially similar to that involved with the first two land sales. Here, again, the opposing position is comprised of the denials and affirmative positions similar to those taken in connection with the first two land transactions, the personnel and the details, of course being different and being the subject for your specific and detailed attention when you come to deliberate on that matter.

Paragraph 13, on page 5, is concerned with reassignment. Again, you will see it names four defendants and not Mr. Phillips. The allegations are that these same four defendants, the two Stirlings, Mr. Yanowitch and Mr. Schulz, behaved deceptively when, in papers that were filed with the SEC and in other written representations, they showed income being recognized by Homex from sales of modules at the time when those modules were assigned to specific projects or contracts.

It is alleged in this paragraph that the representation was false and that the defendants knew it was false because the modules were being reassigned from project to project to the substantial degree alleged in the paragraph and claimed by the government to have been established by its evidence.



jpa 19

1  
2 It is charged in the last sentence of  
3 this paragraph that the history of these large-scale  
4 reassignments was deliberately withheld as part of  
5 the fraud, both from the auditors of Homex and from the  
6 SEC.

7 Defendants deny that there was any fraud  
8 or deception in this matter of so-called reassignments.  
9 They say that their accounting practices in this  
10 respect resulted from good faith consultations with  
11 their auditors and other experts, that they gave all  
12 the material facts to those experts when soliciting their  
13 opinions. They contend that the problem of re-  
14 assignments really becomes significant, if at all,  
15 only when there is a reversal of sales after the close  
16 of the accounting period in which those sales were made  
17 and reported. They deny that there was any signifi-  
18 cant amount of reassignments of this nature in a  
19 later accounting period. They deny that there was  
20 in any respect in this connection any intention to  
21 mislead or deceive. They charge that the govern-  
22 ment's figures on reassignments are inflated and in-  
23 accurate because the figures count a module more than  
24 once when it has been reassigned more than once, and  
25 they assert that that is an improper representation



jpa 20

of the situation.

Paragraph 14, beginning farther down on page 5 and running over to page 6, involves all of the defendants and concerns the Greater Gulf Coast Housing Development situation, the matter of the Farmers Home Administration and the important question of the allegedly forged \$15 million commitment letter from that Farmers Home Administration; and that according to the more detailed allegations by the government was purportedly forged in Mr. Phillips' office, though it is purported to have been signed by Mr. Richardson, a witness, you will recall, who denied it was his signature and which led to conflicts with Mr. Phillips that will be among the many things for you to review and resolve.

That, of course, is only one part of the series of incidents from which the government makes its accusations relating to the Mississippi transaction.

The paragraph alleges that the defendants fraudulently and falsely inflated Homex sales and earnings by including in their reports purported arm's-length sales of modules for a total of \$15 million to a nonprofit corporation, the Greater Gulf



jpa 21

Coast Corporation, which had no assets, where the supposedly expected payment rested solely and entirely on the commitment letter, which is alleged to have been a forgery.

Other aspects of the Mississippi transaction are further alleged in paragraph 14, including a charge that the sale with the asserted \$15 million commitment rested upon a backdated contract when the contract was actually signed after the end of the accounting period for which that sale was reported, that the contract was conditioned on the manufacture of modules in Mississippi as well as the obtaining of federal funding, whereas Homex was not in a position to satisfy or expect the satisfaction of either condition.

Then there are the further things that are alleged, including, again, the use of a forged commitment letter to deceive and mislead Homex's auditors into the certifying of its financial statement.

With respect to this Mississippi situation, the defendants again deny guilt and deny any of the kinds of wrongdoing charged in the indictment. You will understand that their situations differ and that their positions differ with respect both to these



jpa 22

files and with respect to such affirmative evidence as they have placed before you on this subject.

Specifically, I think it is fair to say, subject to your judgment, that the defendants David and William Stirling and the defendants Harold Yanowitch and Edwin Schulz contend that they had no knowledge and no sound reason to believe that the commitment letter was forged or that the Greater Gulf Coast contract was not a valid and effective transaction on which income could properly be accrued.

The defendant Phillips denies any knowledge of any forgery or participation in any forgery, and denies, indeed, any knowledge whatever of the existence of that purported commitment letter during the relevant time in 1971.

All of the defendants contend that all of the other aspects of the Greater Gulf Coast transaction were normal and proper, aboveboard and non-deceptive.

Paragraph 15 involves another alleged aspect of the scheme and device charged by the government and again names all five defendants. This relates, briefly, to the charges concerning installation division revenues or the so-called cost overruns, the charge



1 jpa 23

2 of falsification with respect to U. S. Shelter revenues  
3 and charges of deception relating to deferred, general  
4 and administrative expenses for the period ending Febru-  
5 ary 28, 1971.

6 Here, again, the defendants deny any  
7 wrongdoing. They deny that there was anything  
8 false or misleading about the way their books were  
9 kept with respect to the three matters referred to  
10 by that paragraph. In addition, they insist  
11 affirmatively that the relevant information was fully  
12 and accurately disclosed to the auditors who reviewed  
13 their accounts and their accounting practices.

14 Finally, on page 7 of the indictment we  
15 come, in paragraph 16, to the allegations with respect  
16 to the United Brotherhood of Carpenters. Here  
17 three of the defendants, the two Stirlings and Mr. Yano-  
18 witch, are named. The two others, Mr. Schulz and Mr.  
19 Phillips are not alleged to have been involved. The  
20 three who are named are alleged to have participated  
21 in deceptive practices with respect to the carpenters  
22 union, the union that represented Stirling Homex workers,  
23 during material times in this case.

24 The falsification here is alleged to  
25 have been in the nature of material omissions. It is



jpa 24

charged, as you know, that when the SEC registrations and other reports described the corporation's labor relations, its relations with the carpenters union, the statements were materially false and misleading because they omitted to disclose that seven members and officials of the brotherhood had had arrangements made for stock purchases on their behalf at prices less than fair market value, had had the purchase prices paid largely or wholly on their behalf through the defendants through Stirling Homex, and were further benefited in secret when, after the market price had fallen, the defendants arranged that stock held by at least some of them would be sold for them at prices substantially above the market price so that they would be insulated against suffering any loss on those stock transactions.

In response, the defendants once again rely on a general denial and other things. They deny that the loans to pay for the stock were guaranteed by David Stirling. They deny that Homex cash was used as secretly as the government alleges in the guise of checks for ostensible expense vouchers to pay off those loans. They argue that there was nothing improper and nothing they were required to report



jpa 25

about stock purchases by officers or employees of the carpenters union. They say that the number of shares involved was insignificant, that anyone could have purchased the stock at the same price as that paid by the union leaders, and that the purchases were made with the knowledge and acquiescence of the underwriters. And on those, and such other things that you have heard, they take the position that there was no material omission or deception of any kind.

Now, I have been reading and paraphrasing, because it seems important for your purposes, what I call the essence or the heart of the allegedly fraudulent scheme which recurs throughout the case. I have left out details and I remind you of that, and by details I don't mean that any of the things I have left out are insignificant. All of the things you have been told about in many weeks of evidence and many hours of summation are the grist for your mill and you are now required to treat all those things, whether I mention them illustratively or not, in your efforts to reach a just decision.

The various counts, as I have told you, rest in our federal system on a variety of federal statutes. Each statute punishes a different species

jpa 26

of conduct that the Congress has found should be declared to be criminal. So you will see as we go along that under each statute the so-called essential elements of the offense vary one from the other. That is how it happens that a basic, overall scheme of this kind could lead to a multiplicity of criminal charges. The fact still remains, and I think all the attorneys would agree, that your fundamental concerns in the end will undoubtedly be in analyzing the claims respecting that scheme and determining whether the government has met its burden of proof in showing that or not.

I don't mean to say, however, that any of the other essential elements on which I will be instructing you may be ignored or overlooked. I will be reminding you that nobody may be convicted of any crime here or in any other case unless all the essential elements comprising that crime have been proved beyond a reasonable doubt.

Now, we are moving closer toward the specifics of the counts. But before we get to them I want to read to you some further instructions about a couple of general matters that are not disputed but that will be, we believe, of assistance to you in



pa 27

understanding the case and understanding your functions.

First a few words and a few pages about methods of accounting.

You know by now, surely, that this is not a lawsuit in which the dispute concerns choices of accounting theories. It is not a dispute about accounting principles because there isn't any difference of opinion about the accounting principles. Nobody contends that wrong accounting theories were used. What the government contends is that although the accounting procedures and theories were unobjectionable, facts, material facts, were misstated or omitted causing the accounting records and the public statements and others to be materially misleading, even though the accounting theories were perfectly acceptable and proper. Of course, it is at that point that the parties come to issue.

Those claims of deception in using the accounting theories are denied and affirmatively opposed by each of the defendants.

Having that in mind, it seems to us that it would still be helpful for those of you who, like me, and even some of the lawyers, are not expert in accounting

1 jpa28

2 to have as part of the setting of your thinking some  
3 fundamental ideas which the attorneys and I have  
4 agreed in a statement of about accounting principles.

5 Let me start by telling you there are,  
6 for our purposes, two principal methods of accounting,  
7 the accrual method and the cash method. The cash method  
8 is used by most of us as individuals, and that is a me-  
9 thod under which a sale, if you have a sale, would  
10 be recorded when the cash is received in exchange for  
11 goods or services. Just as you and I normally  
12 on a cash method report income when we get the cash  
13 and expenses when we pay it out. Expenses, as I  
14 say, are recorded when cash is disbursed when you are  
15 on a cash method. So, very simply put, a cash  
16 basis or cash method of accounting reflects cash  
17 transactions. If in rare instances a company is  
18 on the cash basis, when it sells a product a sale  
19 is recorded after the delivery is made and the cash  
20 is received. Similarly, as I said of us as  
21 individuals, under that cash method the company would  
22 accrue or recognize or report the expenses of making  
23 the product and selling it when cash is disbursed  
24 for materials and labor and whatever else.

25 The other principal method, as I say, prin-



jpa 29

1           cipal method of accounting, is the accrual method.       For  
2           lots of reasons, many of which I don't know and none  
3           of which need to concern us too much, that is  
4           in fact the method of accounting used by most businesses  
5           or most corporations of any complexity.       It is a  
6           method that is used because it ought to be and  
7           because it is a proper one, and there is no question  
8           about that and you will understand that.  
9

10                   Under that accrual method sales are re-  
11           flected when they are billed, and expenses are recorded  
12           when they are incurred.       That, to make the point, is  
13           without regard to when the cash is received or paid out.  
14

15                   For example, if a company sells a product  
16           on this accrual method and bills a customer properly  
17           at the end of the month for all of the products  
18           sold during that month, then under accrual account-  
19           ing during that month those sales would be recorded  
20           for those products.       Even though the company re-  
21           ceived no cash in that month, it would be proper under  
22           accrual accounting, and indeed required, to reflect  
23           as completed sales and accounts receivable all claims  
24           for amounts of such products billed during that  
25           month.

                  The same is true of expenses.       Under

1 jpa 30

2 accrual accounting the expenses of making and selling  
3 products are reflected in the period in which the  
4 expenses are incurred without regard to the cash  
5 payments satisfying those obligations. So if a  
6 corporation on the accrual method has an outstanding  
7 bill and expenses related to that bill which has  
8 been received in January but is for products made in  
9 December, that bill may be posted in the company's  
10 books for December even though the bill was not  
11 paid in December and may not be paid for some period  
12 thereafter.

13 Now, what approaches the problems  
14 in this case is the next conception under this  
15 account of accounting methods.

16 In order to recognize income or revenue  
17 properly under the accrual method of accounting there  
18 must be a reasonable assurance that the proceeds  
19 of a sale will actually be collected. Thus, if  
20 the company knows that the buyer is in fact unable or  
21 unwilling to pay, the company cannot recognize revenues  
22 due from that ostensible buyer on a sale.  
23  
24  
25



1  
2 So, too, if the company has an agreement with  
3 the buyer to accept the goods back from the buyer if some  
4 contingency arises, there is not a true sale and revenue  
5 from that sale may not properly be recognized.

6 One other aspect of accounting methods is  
7 relevant here. There is a particular form of the accrual  
8 method of accounting used, again quite properly, by  
9 certain companies, depending on their enterprises and the  
10 nature of those enterprises, which is the percentage of  
11 completion method of accounting. Now, under this method  
12 a corporation or company records in periodic stages its  
13 projected revenues and expenses for each stage of the  
14 business operation. This method of accounting may  
15 properly cause the recording of revenue and expenses and  
16 it is, as I say, a refinement of the accrual method.  
17 It may be used appropriately to record book profits, even  
18 where the company has not yet received payment or even made  
19 delivery.

20 For example, a company undertaking a long-term  
21 project construction or something else may do most of  
22 the work in one year and finish the project in the next  
23 year. Under the percentage of completion method the  
24 expenses and projected revenue may be entered on the book  
25 in stages over the period during which the project is

1 2cs 32

2 being completed, so that in that example you might have  
3 most being recorded in the first year, even though final  
4 completion doesn't happen until the second year.

5 Here again, however, we come to where the  
6 issues are and the point, which is that whether the use of  
7 this method of accounting is appropriate, whether the  
8 recording of revenue or income is appropriate under this  
9 method, depends upon whether or not there is a reasonable  
10 assurance that the purchase price will be paid and that  
11 in relation to a large portion of the issues in the case  
12 points you toward where your concerns will lie, as to  
13 whether the recognition of income, as it has been called  
14 properly and repeatedly in this case, was proper from time  
15 to time on the several transactions that are at the heart  
16 of the case, the land sales, Gulf Coast, and so on.

17 I want to give you some more general thoughts  
18 and then we will move toward the center. I want to just  
19 speak to you very briefly about something many of you  
20 know and some of you may not, about the purposes of the  
21 securities acts which directly underlie three counts of  
22 this indictment and have been a concern of yours pretty  
23 much throughout the case.

24 We have a Securities Act of 1933 which is one  
25 important federal statute. We have the Securities



3cs 33

1       3cs  
2       Exchange Act of 1934, which enlarges, expands and builds  
3       upon the '33 Act and is another basic statute in our  
4       system.    You don't have to know these statutes.    Most of  
5       us have not memorized them and have to look them up  
6       when we have to deal with them, but I will tell you for  
7       your background understanding at least the central purpose  
8       they are sought to serve.    Very simply stated, both of  
9       those statutes are based on the fundamental belief of the  
10      law makers that sales of securities, stocks and bonds and  
11      so on, at least where interstate commerce is involved,  
12      should be allowed to go forward only where there is full  
13      and fair disclosure of relevant information to prospective  
14      purchasers of those securities, and the statutes create  
15      a number of devices for disclosure, for the revelation of  
16      facts, many of them conducted via the SEC or under the  
17      supervision and regulation of the SEC, the Securities and  
18      Exchange Commission.

19               Now, the Congress in those enactments, now  
20      some forty-odd years old, recognized that the average  
21      investor in a complex society, in a complex economy, when  
22      he considers the purchase of a security in a publicly held  
23      corporation, is not in a position to make a personal  
24      investigation of the worth of the security, of the assets  
25      of the assets of the corporation, of its business and its

1 4cs 34  
2 problems, and so on, and so under the '33 Act initially  
3 with respect to companies that are subject to that act --  
4 and there is no dispute that Stirling Homex was such a  
5 company, subject to the Securities Acts -- Congress made,  
6 as I said, a detailed set of requirements that before  
7 securities could be put on the markets true and full  
8 disclosure be made of various kinds of facts about the  
9 business, its financial condition, its profits and losses  
10 for recent periods, its expenses, its prospects, the nature  
11 of its various business relationships, customers, unions,  
12 and so on.

13 Now, again, you don't need to memorize this,  
14 but two sections of the '33 Act are involved in this case  
15 and I will just mention them briefly to you.

16 First, there is a section that prohibits  
17 schemes to defraud, prohibits the making of materially  
18 untrue statements, and prohibits the use of fraudulent  
19 practices in the interstate sale of securities, and that  
20 is a statute that underlies Count 1 of the indictment.

21 Secondly, we are concerned with another section  
22 which involves registration statements and those are rather  
23 lengthy documents filed with the SEC telling about the  
24 corporation and embodying a prospectus, an account of the  
25 corporation that is to be made available to prospective



1 Sec 35

2 purchasers of securities being issued to the public, and  
3 that section forbids the making of materially false  
4 statements or the inclusion, when they speak of inclusion  
5 of material omissions in the course of such statements,  
6 which might mislead or deceive prospective purchasers, and  
7 that section is the basis for Count 2 of the indictment.

8 Now, finally, though it is reached much later,  
9 I mention to you the Securities Exchange Act of 1934,  
10 which also requires full and accurate disclosure of the  
11 facts, and it touches upon the requirement of such  
12 disclosures in quarterly reports and annual reports and  
13 other kinds of publications corporations issue or are  
14 required to issue and file on a regular basis with the  
15 Securities and Exchange Commission.

2 16 Now, that '34 Act requirement and prohibition  
17 that accompanies it is part of what you are concerned with  
18 when you reach the last count, Count 9, because that con-  
19 spiracy count which charges the violation of an array of  
20 statutes includes a charge of a conspiracy, I should say,  
21 to violate that provision which I have cursorily described  
22 to you of the 1934 Act.

23 Let's proceed now through Count 1. On page 7  
24 you come to the statutory allegations. All the preceding  
25 paragraphs have been a part of Count 1 and are a part of

6cs 36

Count 1. They are also part of the later counts.

As I told you, each statute involved in this case forbids under criminal penalties specified kinds of conduct and so in each count, as it were, you have statutory allegations because within the overall scheme that the Government alleges and must prove if it is to get a conviction, each statute focuses on certain critical elements, essential elements, as I will call them, which differ more or less, from statute to statute and therefore require your particular and specific focus with each count in deciding was this count proved, was this statute violated, as lawyers would say, and that is the way you proceed logically from count to count.

As I told you, this rests on the provision of the '33 Act that forbids fraudulent schemes or devices and specifically you see Paragraph 17 contains the ultimate accusation in the first count and it says that all the defendants, beginning in January 1968 -- and the exact dates are of no consequence whatever, except in one respect that I will talk to you about later on, in respect of the statute of limitations -- charges that the defendants "unlawfully, wilfully and knowingly, by the use of means and instruments of transportation and communication in interstate commerce and by the use of the mails, directly



1 and indirectly, in the offer and sale of securities, to  
2 wit, the common and preferred stock of Stirling Homex  
3 Corporation: (a) did employ devices, schemes and artifices  
4 to defraud; (b) did obtain money and property by means  
5 of untrue statements of material facts and omissions to  
6 state material facts necessary in order to make the state-  
7 ments made, in the light of the circumstances under which  
8 they were made, not misleading; and (c) did engage in  
9 transactions, practices and courses of business which  
10 operated and would operate as a fraud and deceit upon the  
11 purchasers of Stirling Homex Corporation securities."

12  
13 And now I instruct you that before any  
14 defendant could be convicted under Count 1 the Government  
15 must have satisfied you beyond a reasonable doubt on each  
16 and every one of three essential elements -- I say each  
17 and every one because if any one of these is not estab-  
18 lished you must acquit -- the first of which has a sub-  
19 division (a), (b) and (c) but you won't have to memorize it,  
20 I will read it anyhow, and the three essential elements  
21 are as follows:

22 First, that in connection with the offer of  
23 sale of Stirling Homex common or preferred stock the  
24 defendants or any one that you are particularly consider-  
25 ing, did any of the following:

(a) Employed any device, scheme or artifice to defraud; or, (b) obtained money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made under the circumstances not misleading; or, (c) engaged in any transaction, practice or course of business which would operate or did operate as a fraud or deceit upon the purchasers of that stock.

That is the first essential element. Either (a) or (b) or (c) must be shown to make out that first essential element.

Second, that the defendant in doing those things acted wilfully and knowingly; and, third, that the defendant used or caused to be used the mails or means of communication in interstate commerce in furtherance of the scheme.

I think you will know from my reading of that that the heart and focus of your concerns will probably be on the first two of those essential elements. Again, all three must be found before you could convict.

I am going to go back and elaborate on each one of those three to help you understand them.

First, there is a requirement, broken down into (a), (b) or (c), that may be for adequate shorthand



1 9cs 39  
2 purposes described as the requirement of proof of a  
3 scheme or plan to defraud in connection with the issuance  
4 of the securities purchasers of that Stirling Homex stock.

5 Now, the language describing the element, as  
6 I have read it to you, is more or less familiar, every-  
7 day language. It is largely self-explanatory, but not  
8 necessarily wholly self-explanatory. It talks about  
9 a scheme to defraud and I mention to you, or perhaps just  
10 following the dictionary, that a scheme in this setting,  
11 as in others, is a design or plan for the accomplishment  
12 of some goal or objective. A fraud is a sweeping concep-  
13 tion. It is a term that embraces all the possible means  
14 by which human ingenuity can seek to have the ingenious  
15 formulator of the fraud to gain some unfair advantage over  
16 another person by misrepresentation, by false suggestions  
17 or by suppression of the truth, and so a scheme to defraud  
18 in this setting is a plan or a design by which one or  
19 more people seek to obtain money or property by means of  
20 representations as to material facts that are false, and  
21 those representations may be made in one or two ways.

22 First by simply stating facts as true when the  
23 facts are not true and, second, by the omission from what  
24 is said of material facts that are necessary to make what  
25 was said, what was not omitted, truthful.

10cs 40

Now, frequently as I have read those things you've heard me say a sort of large mouthful to you about omissions to state material facts necessary in order to make the statements under the circumstances not misleading, and although that is a bit of a mouthful, I trust by repetition it becomes clear to you it has reference to omissions which are materially misleading, because although the things that you did say were true they convey and are meant to convey a false impression because of what you left out.

What I mean by that is that, and all of you know this that if you think about ordinary affairs of life, a statement may be literally true so far as it goes but it may nevertheless be false if it omits things that would be rationally necessary to avoid misleading and deceiving the person to whom the statement is made.

In other words, if statements are made in a business or other transaction, or even in non-business aspects of life, which are in themselves true, but if they omit material facts, facts that would be significant for the conduct and understanding of any person or persons to whom the statements were directed, the omission might cause the statement as made to operate as a fraud and deception. I don't know if that needs further elaboration,



1 but if you say to somebody: "That is the door to the  
2 bedroom," and that is true, but you omit that the floor  
3 has been removed from the space inside that door, that  
4 would be a very material omission. The person walking  
5 through might get killed. What you said is true,  
6 "That is the door to the bedroom," and so all this language--  
7 I hope that example has nothing to do with the case, and I  
8 can't see how it has anything to do with the case -- all  
9 that language about material omissions relates to that  
10 situation where what was said was true, but when you  
11 extended it what was left out was a material omission  
12 necessary so that the person to whom the communication  
13 was given would get the kind of truthful communication  
14 you were purporting to give and he or she was expecting  
15 to receive.

17 Now, the paragraphs that we went through from  
18 10 through 16 enumerate the various kinds of material  
19 misstatements and material omissions charged in this  
20 case.

21 I instruct you for purposes of Count 1, the  
22 count we are now on, that the Government, if it proves  
23 the other elements, is now required to prove every misrep-  
24 resentation or omission it alleges. It would be suf-  
25 ficient, if the other elements are established, to convict

12cs

on Count 1 if the Government proves beyond a reasonable doubt that at least one of the misrepresentations or omissions was made in furtherance of the scheme to defraud.

In addition, I stress to you the things the Government must prove, but it is also meaningful to tell you the things that are not necessary to be proved. I tell you it is not necessary for the Government to establish that any particular person relied on or suffered damage as a consequence of any false statements or omissions of material facts. It is enough if you find in this respect that false statements or statements omitting material facts were made as a part of the fraudulent scheme in the expectation that they would be relied upon.

Now, at the same time as a matter of simple, common sense, which is your main asset, I might say, in this case, you will understand that if you find evidence that the allegedly false statements were relied upon and they were effective, this may be considered by you in determining whether a fraudulent scheme or device of the kind alleged has actually been established by the proof in this case.

I have used the words material and materiality repeatedly, as the indictment does, in describing the



13cs 43

2 kinds of false statements or omissions that are wrongful  
3 under all of the laws with which you are concerned.  
4 We use the word material to distinguish it or distinguish  
5 the kinds of statements we care about from those that  
6 are immaterial. All statements and omissions, though  
7 they might be of interest to somebody, are not necessarily  
8 material. A material fact in the setting of this case,  
9 which is centered upon the concerns of purchasers  
10 ultimately of Homex stock, or in some instances auditors  
11 and others concerned with the true functioning of the  
12 business, a material fact in this setting is one which  
13 could reasonably be expected to induce a person relying  
14 on the statement to decide to act or not to act. This  
15 means that if you find a particular statement of fact to  
16 have been untruthful or a particular omission to be such  
17 that it made statements untruthful, before you can find  
18 that statement or omission to be material you must also  
19 find that the statement or omission was of such a nature  
20 that it would or might reasonably have induced the person  
21 to act or not to act, and in this case specifically to  
22 purchase or not to purchase the stock of Stirling Homex.

23 As I say, the same is true with statements and  
24 with omissions. If you find that information which  
25 was withheld or omitted would, if disclosed, have signifi-

1                   mcs 44                   A 598  
2                   cantly changed the nature of the information that was  
3                   given and would have changed the information so that the  
4                   effect on the decision to act or not to act would or might  
5                   have been different, then the omission was material.

6                   If you find that the addition of the omitted  
7                   information wouldn't have made any difference, then you  
8                   may not find that the omission was a material one.

9                   Now, I have tried to enlarge for you on the  
10                  first essential element, if you find there was the kind of  
11                  wrongful scheme to defraud that I have been talking about.

12                  The second essential element, without which  
13                  nobody could be convicted, is the element of criminal  
14                  intent or, in the language of the indictment and of our  
15                  standard instructions, the requirement of proof that the  
16                  defendant you are considering acted knowingly and wilfully  
17                  in his participation in that scheme.

18                  Now, those words are key words.           As I say,  
19                  they describe criminal intent, but they are not mysterious  
20                  in their definition and they are not especially arcane or  
21                  subtle.   We say for this purpose generally that an act  
22                  is done knowingly if it is done voluntarily and purposely  
23                  with an understanding of the nature of the act and not  
24                  because of mistake or accident or negligence or some  
25                  other innocent and unaware kind of reason.



T#5 1

jpal 45

2 We say an act is wilful if, in addition to  
3 being knowing in its performance, it is done deliberately.  
4 To show that somebody acted wilfully in this sense  
5 it is not required to show that the defendant or  
6 someone, in addition to knowing what he was doing,  
7 knew that he was violating some particular law,  
8 knew, for example, that this is wrong under the '33 Act  
9 or this is wrong under the '34 Act. While he  
10 does not need to know the law however in that sense,  
11 the defendant, before he may be convicted, must be shown  
12 to have had a specific intent to defraud. That  
13 means he must have engaged or participated in knowing  
14 and deliberate deception, participated in the knowing  
15 and deliberate making of false statements or knowing  
16 and deliberate creation of material omissions with an  
17 intention to deceive for the purpose of causing  
18 financial loss to others or obtaining directly or  
19 indirectly financial gain for himself.

20 Because that kind of intent to defraud  
21 is essential before there may be conviction, it  
22 follows that good faith on the part of any defendant  
23 would be a complete defense. When I say defense  
24 I don't mean that defendants need to prove their  
25 good faith. I simply focus you on this issue by

jpa2 46

1 mentioning that but remind you that the government's  
2 burden in making out an intent to defraud might be  
3 stated to be the burden of proving the absence of  
4 good faith.  
5

6 What I mean, therefore, is that in this  
7 fraud charge even false representations on material facts  
8 or material omissions would not be fraudulent  
9 if they occurred or were made in good faith. An honest  
10 belief that what you are saying is true or what you  
11 are omitting does not make it false would be a good  
12 defense, however inaccurate the statements might have  
13 been or however material in the end the omissions  
14 might have been.

15 I instruct you at the same time that a  
16 belief by any defendant, if there was any such  
17 belief, that even though false and deceiving things  
18 were being said everything would work out so that no  
19 one lost any money, such a belief would not require or  
20 justify a finding that that person was acting in  
21 good faith. No amount of honest belief that in any  
22 event you will succeed and nobody will suffer  
23 any real losses will excuse fraudulent actions of the  
24 kind we are concerned with or false representations  
25 that may or will subject others to be misled, to suffer



1 3jpa 47

2 losses or to suffer the risk of losses in the kinds of  
3 transactions with which the law involved here is  
4 concerned.

5 Now, again, further on the question of  
6 good faith, you may consider the evidence and argument  
7 that you have heard that reliance was placed on the  
8 advice or opinions of such experts as accountants or  
9 lawyers or both. Honest reliance, honest reliance  
10 upon the advice of an expert, may serve in a proper  
11 case to negate the kind of knowing and wilful misconduct  
12 required for conviction. I mean, considering that  
13 subject, insofar as you may find there was a reference  
14 to such advice you must have in mind that the nature  
15 and effect of the advice has to be appraised in terms  
16 of the completeness and accuracy of the facts  
17 that were given to the defendant, given to the account-  
18 ant or lawyer, on the basis of which the advice was  
19 rendered. If an attorney or an accountant has a  
20 full account of the facts of what you are doing and  
21 what you intend to do and then says it is proper, it  
22 is lawful, your proceeding on that basis might serve  
23 as a strong indication that you were acting in good  
24 faith and not in bad faith.

25 On the other hand, you will realize that

1 4jpa 48

2 if some of the important facts are misstated to the  
3 accountant or lawyer or if some of the important  
4 information is withheld and not disclosed, the advice  
5 that the accountant or lawyer then gives can hardly be  
6 deemed to constitute a basis for claiming good faith  
7 in going ahead and acting on the basis of that uninformed  
8 and insufficiently implemented advice.

9 I have told you already that the kind of  
10 knowing and wilful misconduct required to be proved  
11 before there may be a conviction cannot be established  
12 if misstatements or material omissions are found to  
13 have been the result merely of negligence or carelessness.  
14 In connection with this I am also instructing you,  
15 as you have probably realized in any  
16 event, that you may consider whether any defendant  
17 deliberately closed his eyes to what otherwise  
18 would have been obvious to him and did that with a conscious  
19 purpose to avoid learning of the truth about  
20 the representations and statements or omissions that  
21 were being given to the public or to the Securities and  
22 Exchange Commission.

23 A person who makes representations  
24 not knowing whether they are true or false similarly  
25 cannot be regarded as acting innocently. If you



5jpa

assert something to be the case, the assertion carries with it the implicit representation that you know it is the case. If you assert something to be true when in fact you do not know whether it is true or false, then the assertion is misleading or deceptive. Such an assertion cannot be deemed for our purposes, if you find any to have occurred, to be innocent.

Now, all this talk about knowledge and intent directs you to be concerned, as you will be concerned, with the subject of people's states of mind. That is a subject with which we regularly deal in real life as well as in the courthouse, but it is a subject, as you know, of some subtlety and complexity. Knowledge, guilty knowledge, the intent to defraud, are things respecting which we cannot normally rely on so-called direct evidence when we are trying to determine whether a person has or had such knowledge or such intent.

Sometimes we do have direct evidence. A person may make a statement or write a letter saying this is what I know and this is what I intend or this is what I intended or this is what I didn't know. Of course, that is direct evidence. Of course, insofar as you have it, and you certainly have a fair amount of

6jpa

1 such evidence in this case, you will take it into ac-  
2 count. But apart from such direct evidence, where we  
3 don't have it, or above and beyond it where we do have  
4 some, we habitually consider, and you will consider,  
5 all the circumstantial evidence in the case in  
6 deciding whether the alleged intent to defraud has  
7 been made out with respect to one or more of the de-  
8 fendants.  
9

10 The existence or nonexistence of guilty  
11 knowledge is something commonly to be inferred from  
12 what I call circumstantial evidence, distinguishing it  
13 from direct evidence, and that means from a considera-  
14 tion of all the circumstances that seem to rationally  
15 have a bearing on that subject.

16 What do you consider when you try to  
17 figure out whether somebody acted purposely, intentionally,  
18 with knowledge of one thing or another, something you  
19 do all the time? You consider who the person is,  
20 what the circumstances were, the level, so far as  
21 you know him, of his intelligence and his sophistication,  
22 the means of information available to him or at his  
23 disposal, the plausibility or implausibility of  
24 supposing that the person acted deliberately or not  
25 deliberately. You consider, in short, all the



jpa 51

circumstances and put them together in the whole setting of this case and decide from all that evidence with respect to each defendant whether he acted knowingly and wilfully on the occasions leading to this prosecution.

In a business setting, which is what we have here, there may be various kinds of more specific things to consider in determining the knowledgeability and the wilfulness of allegedly wrongful behavior. So you will consider things that I will mention to you just illustratively and then add to them all the things that you know from all the diverse experiences you have had in deciding this question of criminal intent.

The kind of wrongful purpose that is charged throughout this case may be refuted or sharply discounted by evidence to the extent you find such evidence that the actions in question were taken openly and normally with full disclosure, with clear and standard records, and in general in a business style of proceeding that is inconsistent with the kind of wrongful, fraudulent, deceptive kinds of purposes charged in this indictment and claimed by the government to have been proven.

jpa 52

On the other side, a wilful intent to deceive or mislead may be indicated or suggested or approved or established by combinations of business behavior of which, again, I will give you the illustrative examples.

Evidence tending to prove this kind of wrongful intent could prove the covering up or hiding of information of known items of specific expenditures and the concealment of such pertinent information from one's auditors and others.

Second, the use of cash for important and large financial transactions in situations where normally checks would be employed.

Third, the alteration or destruction of books and records and deviations from the making of normal and ordinary entries in such documents.

Fourth, the avoidance of making records which are usual in a given kind of transaction.

Fifth, and a kind of catchall, any kind of conduct, the likely effect of which, in your judgment, would be to mislead or conceal the true facts as to corporate income and expenses.

So I say in sum that on that second and essential element under count 1 it is for you finally



1 jpa 53

2 to review together and put together all the circumstances  
3 in deciding whether or not, with respect to any defendant,  
4 that element has been established beyond a reasonable  
5 doubt with respect to any defendant.

6 Before I go on to the third essential  
7 element, which is a subject more quickly covered anyhow,  
8 let me say a word to you about the conception and  
9 the legal notion of aiding and abetting. For those  
10 of you who are technically-minded you may notice as you  
11 go through that at the end of each of the first eight  
12 counts of this indictment where the statutes are cited --  
13 that is, the laws of Congress that are said to have  
14 been violated in that count -- at the end of each one  
15 there is a reference to Section 2. That is Section  
16 2 of Title 18, which is -- you don't need to know  
17 this -- the U. S. Criminal Code containing most if not  
18 all of our many criminal laws. Section 2 is the  
19 aiding and abetting statute.

20 I instruct you that a defendant could  
21 be found liable under count 1 or under any of the first  
22 eight counts, the substantive counts, as I call them  
23 or as we call them, as distinguished from count 9, the  
24 conspiracy count, a defendant could be found guilty,  
25 if all the essential elements are shown, even though

1 jpa 54

2 he did not himself commit the act, the wrongful act,  
3 directly; he could be found guilty if, beyond a  
4 reasonable doubt, he is found to have been what is  
5 known to the law as an aider and abettor. That is  
6 what that Section 2 is about.

7 Now, again, not vital for you, but since  
8 Section 2 is brief and it is not every day you listen  
9 to federal statutes being read, I will read to you  
10 Section 2 and I will tell you what it is about. It  
11 is the following:

12 "(a) Whoever commits an offense against  
13 the United States or aids, abets, counsels, commands,  
14 induces or procures its commission, is punishable as  
15 a principal."

16 He is punishable if he did it directly  
17 himself.

18 "(b) Whoever wilfully causes an act  
19 to be done which, if directly performed by him or  
20 another, would be an offense against the United States,  
21 is punishable as a principal."

22 What I have said then, under that statute  
23 and under this indictment as it has been laid against  
24 these defendants, if the essential elements are made out  
25 it is not essential to show that a defendant himself



1 jpa 55

2 physically and directly committed the act or caused the  
3 omission in question if instead you find that he  
4 aided and abetted the commission of that act or the  
5 causing of the omission and did that knowingly and  
6 wilfully.

7 Now, that means, of course, you cannot find  
8 anybody guilty as an aider and abettor unless you  
9 find that the offense was actually committed. You  
10 cannot aid and abet the commission of an offense when  
11 the offense never happened. But then, more cen-  
12 trally, what do we mean by aider and abettor, and how  
13 do you decide whether somebody is that?

14 Let me say first negatively that you  
15 must find more than mere knowledge on the part of the  
16 person that a crime is being committed. A mere  
17 specgator is not a participant and is not an aider  
18 and abettor. To decide whether a particular de-  
19 fendant aided and abetted the commission of an  
20 offense you ask yourselves these questions: Did he  
21 wilfully associate himself with the criminal ven-  
22 ture? Did he wilfully participate in it as some  
23 thing that he wanted to bring about even though  
24 he did not accomplish the criminal misconduct directly  
25 or personally? Did he knowingly and wilfully, by

1 jpa 56

2 his own action, intend to help make that criminal  
3 enterprise succeed? If he did then you may find,  
4 if that is proved to you beyond a reasonable doubt,  
5 that the person in question was an aider and abettor.  
6 Otherwise, you may not.

7 Now I come to the third essential  
8 element and I remind you now that the first element  
9 is the proof of the scheme to defraud; the second, the  
10 proof of knowledge and wilfulness. If you find  
11 those things, you must still, before you may convict  
12 on count 1, find a use of the mails for a means  
13 or instrumentality of interstate commerce in further-  
14 ance of the scheme. That, as you know, is what the  
15 indictment charges.

16 You may also realize, I might say, from  
17 the long hours of summation to which you listened,  
18 that very possibly this third element is not at the  
19 heart of the case. There wasn't any debate on this  
20 subject, but I remind you nevertheless that it is an  
21 essential element and it is for you to decide whether  
22 the government has proved beyond a reasonable doubt that  
23 the defendant you are considering by his own acts or  
24 actions in some way directly or indirectly caused the  
25 use of the mails or the use of the means or instru-



jpa 57

mentality of interstate commerce in furtherance of the scheme to defraud.

The government has introduced evidence of numerous mailings in connection with the registration, in connection with the issuance of stock generally, and has introduced evidence of many interstate telephone calls, telegrams, Telexes or DEX transmissions, and all those are means or instrumentalities. You may have noticed that not all of the evidence of mailings or uses of instrumentalities relates to mailings or uses by one or more of the defendants. I instruct you that under this third essential element it is not necessary for the government to prove that a defendant himself actually placed or received in the mail any of the matters upon which the government relies or that he actually used the telephone and telegraph, etc. It is sufficient to make out this third essential element. If the government has satisfied you that a defendant caused the use of the mail or instrumentality within the meaning of this statute, provided you find that that use or mailing was accomplished in furtherance of the scheme, and so if a defendant knows or could reasonably foresee that his actions in connection with this scheme would

1           jpa    58  
2 naturally and probably result, for example, in the use  
3 of the mails or the use of the telephone or telegraph  
4 in connection with that scheme, he has caused that use  
5 in the sense in which it is referred to in the law  
6 and in this indictment.       That would satisfy that  
7 element provided you find the facts as I have  
8 described them.

9                   I see by the page that I am on that I  
10 will regrettably, for your attention span and for my  
11 voice, run on for a while.    Let me invite all of  
12 you, and even the second-class citizens, my fellow members  
13 of the bar, and anybody else who raises a hand, or could  
14 have, if you need a recess.

15                   Is that a cough?

16           MR. FELDSHUH:       It is a hand, your  
17 Honor.

18           THE COURT:       Well, I have these broken  
19 glasses and I can't see.

20                   Let me tell you where we are.    I have  
21 finished the instructions on count 1.    Now, the charge  
22 is not nine times that long, you will be glad to  
23 hear, but it does go on for, I'm afraid, longer than  
24 I have gone to this point.       So why don't we take roughly  
25 five minutes for you to stretch and we'll pick up at



1 jpa 60

2 THE COURT: I don't want to use your  
3 time or mine very much during the recess, but since  
4 we are taking it, if anybody has observed anything  
5 egregious thus far and you want me to try to correct  
6 it, or even important, you might tell me about it.

7 Do you have a problem, Mr. Mukasey?

8 MR. MUKASEY: Your Honor, I have one  
9 problem and one question.

10 .The problem related to something that  
11 was said up at the beginning of the charge when your  
12 Honor was talking about reasonable doubt. You were  
13 talking about it not being a doubt to a mathematical  
14 certainty. You said in criminal as in civil cases  
15 we deal with probabilities, not certainties. To the  
16 extent that suggested any similarity in the standards,  
17 I don't know whether any of these jurors have served  
18 on civil cases or not, but to the extent that it suggested  
19 such a similarity, it gave me some unease.

20 My second question, or the second matter

21

22

(Continued on next page)

23

24

25

1 jpa 59

2 count 2. And I will remind you to memorize every-  
3 thing I have said so far and keep it in mind as we  
4 go along.

5 We will take a short recess.

6 (The jury left the courtroom.)  
7  
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25



jpa 61

as a question, is this: We had asked whether the court was going to instruct the jury, I think we asked by letter, on character evidence possibly giving rise to a reasonable doubt. I don't recall covering, whether we covered that issue in discussing it before.

THE COURT: No, you did not. I am glad you reminded me. I have left it out. So I will put it in.

MR. MUKASEY: Thank you, your Honor.

MR. GAYNOR: Your Honor, I did read, of course, the proposed charge on reliance, but as I listened to your Honor it occurred to me that perhaps your Honor would consider adding something to there which I have drafted and it is very short. May I read it?

THE COURT: No. I mean the short answer is no. The longer answer is no, thank you. I am sorry, but there comes a point where I won't do that.

MR. EATON: Your Honor, I took serious objection when you were discussing paragraph 10 and later paragraph 12. You said the defendants, meaning all four that are talked about in those land sales, contend that the witnesses must have testified

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1  
2 falsely.

3 THE COURT: I said at least many of  
4 them for the sake of modifying Mr. Feldshuh's request,  
5 which I granted, which seemed to refer to all of  
6 them.

7 But what's your problem?

8 MR. EATON: Mr. Schulz makes no such  
9 contention that any of those people, Barbato, Frank,  
10 etc., were testifying falsely.. His contention is  
11 very simple, that those witnesses did not mention and  
12 there is no proof that Mr. Schulz knew of any of the  
13 alleged side deals and credibility --

14 THE COURT: If you didn't make that posi-  
15 tion clear, I am sorry. I can't take each defendant  
16 and point him to the issue and say he argues this and  
17 he argues that. I understand your exception and  
18 I deny it.

19 Anything else?

20 MR. FELDSHUH: As to the collectibility,  
21 I think your Honor did make some point as to assur-  
22 ance of collection of the amount and the accounting  
23 stipulation with which I agree. I was just wondering,  
24 your Honor, as one of the facts as to which there is  
25 no dispute, namely, that the prospectus of Merrill



jpa 63

Lynch did in fact withdraw from the earnings record, the so-called land sale as to which your Honor pointed out formed a basis for earnings recognition. I was wondering whether it wouldn't also be important to indicate another undisputed fact, namely, that apart from the private land sales, that in fact the projects being federally funded led the accountants and all the professionals in the prospectus to state that the area of collectibility was of no concern because it was contemplated that the projects would be paid for out of the funds of the government of the United States.

THE COURT: No, I am not going to do that. I have left out a lot of facts, disputed and undisputed, that you went into at length. I am not going to add any of this at this point.

Now, let's have an agreement for your sake and mine that the things you have said that I have now ruled on, accepting or rejecting, we have covered, but at the end we will cover anything else as well. Let's take two more minutes or so.

(Recess.)

T6 am 1

MCS 64

2 THE COURT: While you were out, ladies and  
3 gentlemen, somebody pointed out that in instructing you  
4 about the important principle requiring proof beyond a  
5 reasonable doubt I said to you that throughout the law we  
6 can't rely on certainties, we rely on probabilities, and  
7 I did say that is true both in criminal and civil cases,  
8 but it has been suggested, and I accept the suggestion,  
9 that I emphasize to you that the problem always is the  
10 degree of the probability and that the probability you  
11 must find to convict in a criminal case is much greater  
12 and much higher than it is in a civil case, and those of  
13 you who have sat on civil juries must not be misled in  
14 that respect and must understand that here the require-  
15 ment is proof beyond a reasonable doubt and not some lower  
16 standard like a preponderance or whatever that you  
17 encounter in civil cases.

18 Now we come to Count 2 and it appears, as you  
19 see, on page 8 of this indictment. It involves, as I  
20 told you, an alleged violation or alleged violations of  
21 the section of the 1933 Act that forbids false statements  
22 or misleadingly material omissions in registration state-  
23 ments and it charges that that law, as I say, was violated.  
24 It says the defendants in various ways the Government  
25 claims occurred "unlawfully, wilfully and knowingly made



cs2 65

1 and caused to be made untrue statements of material facts  
2 in a registration statement and omitted to state material  
3 facts required to be stated therein and necessary in order  
4 to make the statements therein not misleading," and all  
5 of that is said to have happened in the July 29, 1971  
6 registration statement.  
7

8 The second paragraph alleges that the registra-  
9 tion statement related to 500,000 shares of Homex preferred  
10 stock and that it was required to be filed under the  
11 provisions of law and the applicable regulations, and then,  
12 as the indictment characteristically does, it incorporates  
13 all those charges of a fraudulent scheme which constitute  
14 the seven Paragraphs 10 through 16, under Count 1.

15 Once again this accusation requires before  
16 anybody may be convicted that the Government establish  
17 each and every one of three essential elements here.  
18 However, the problem is more readily, more briefly described  
19 in light of what we have already talked about.

20 The three essential elements are these:

21 First, that Homex filed their registrate state-  
22 ment with the Securities and Exchange Commission, and that  
23 is not disputed.

24 Second, that in the registration statement  
25 so filed the defendants made or caused to be made or aided

1 cs3 66

2 and abetted in making at least one untrue statement of  
3 a material fact or omitted to state a material fact  
4 required to be stated in the registration statement or  
5 necessary to make statements that were made not mislead-  
6 ing; and

7 Third, that the defendants or each particular  
8 one, as you consider him, acted knowingly and wilfully.

9 As I say, the first essential element there  
10 was the filing of the registration statement. That  
11 doesn't seem at all to be in dispute. The Government  
12 exhibits numbered 8 through 12 comprise that registration  
13 statement with such supplements and other things as were  
14 required, and I don't think you need to spend much time  
15 on that.

16 The second essential element which brings you  
17 to the crux of your problem is the requirement that before  
18 any defendant may be found guilty here you must find that  
19 the registration statement filed with the SEC actually  
20 contained an untrue statement of a material fact or omitted  
21 to state a material fact required to be stated or necessary  
22 to make the statements in the registration statement not  
23 misleading.

24 Now here, I remind you of what I have talked  
25 about, the definition of materiality, the nature of a



cs4 67

1  
2 material omission, and I simply tell you that those con-  
3 ceptions that we reviewed are to be applied again here  
4 and you will have to judge here the materiality of any  
5 facts alleged to have been stated falsely, whether the  
6 result was to make the registration statement ~~untrue~~ or  
7 misleading and, likewise, you will consider the omissions  
8 the Government has charged in this respect.

9 In one aspect, however, though the other  
10 instructions on this count are relatively abbreviated,  
11 I must focus your attention on some particular and specific  
12 things that will concern you in your analysis of the evi-  
13 dence and in the conduct of your deliberations.

14 You remember all the allegations of Paragraphs  
15 10 through 17 are reincorporated here and those are a  
16 series of different transactions and courses of conduct  
17 involving different aspects of the Stirling Homex business,  
18 and then different aspects of what is charged as having  
19 been criminal in this case.

20 You will recall, and the indictment will  
21 remind you, that not all the defendants are identified  
22 with all of those alleged items of wrongdoing. I mentioned  
23 earlier places where a particular defendant was not named  
24 in the indictment and you will have that in mind.

25 Now, because Count 2 charges, and there must

1 cs5 68

2 be proof before there may be a conviction, misrepresent-  
3 ations and omissions, specific ones, and because at least  
4 one must be established and connected with any particular  
5 defendant before he could be convicted -- and that, of  
6 course, assumes the other essential elements are made  
7 out -- you must make a precise and pointed analysis of  
8 the evidence for this purpose.

9 Let me try to focus that. What I mean is  
10 that no defendant may be convicted under this count unless  
11 you find that in connection with that registration state-  
12 ment of July 29, 1971 he participated, directly or  
13 indirectly, or aided and abetted in the making of at least  
14 one materially untrue statement or in the omission of a  
15 material fact required to make the statement true, and  
16 in that connection you must have in mind some further  
17 things.

18 I instruct you, because this responds to  
19 the indictment and the proof, I instruct you as a matter  
20 of law that the defendant Phillips could not be convicted  
21 on Count 2 on the basis of any false statement or omission  
22 connected with the land sales. He's not involved in  
23 that aspect of the case.

24 Similarly, I instruct you that neither Mr.  
25 Phillips nor Mr. Schulz could be convicted on the basis



1 cs6 69

2 of any wrongful omission or material misstatement, but  
3 mostly it is a question of wrongful omissions concerned  
4 with the stock transactions with the union officials.  
5 Again, it is not claimed that they are involved in either  
6 of those.

7 Now, similarly where you are dealing with the  
8 reassignments, the same holds true with respect to Mr.  
9 Phillips. He is not involved there and no material mis-  
10 statement or omission with respect to that subject could  
11 be the basis for his conviction under Count 2.

12 Now, a further instruction. This relates to  
13 all of the defendants and becomes of consequence in  
14 dealing with Count 2 in a way that is not in respect of  
15 the other counts. I think you all know, and I will be  
16 reminding you later, that a verdict either way must be  
17 unanimous, and that means a verdict either of acquittal  
18 or conviction, but now I am giving you the requirements  
19 that must be met before there could be a conviction and I  
20 instruct you that before any defendant may be convicted  
21 for the making of a false statement or wrongful omission  
22 in connection with Count 2 you must be unanimous in finding  
23 that particular defendant guilty with respect to at least  
24 one particular false statement.

2

25 Now, I meant all those words, one particular

1 false statement. Let me just illustrate that by taking  
2 paragraphs in which all the defendants are named as  
3 having been participants. Under the outline of the  
4 alleged scheme it is charged that there were alleged false  
5 statements in the financial statements based upon the  
6 recognition of income arising out of the Gulf Coast  
7 activities.  
8

9 Under Paragraph 15 there are similar charges  
10 with respect to the reporting of installation division  
11 revenues and U. S. Shelter revenues, and so on.

12 Now, the Government claims to have shown false  
13 statements or omissions or both in the registration state-  
14 ment connected with these activities alleged in Paragraph  
15 14 and 15. Let me say this to you:

16 If it were to happen with respect to any  
17 particular defendant that eight of you in considering  
18 Count 2 find that defendant guilty of some material false  
19 statement or omission in the registration statement  
20 connected with the Mississippi transaction -- if eight of  
21 you found that -- and four of you believed that that  
22 particular defendant was guilty of false statements or  
23 omissions concerned with those matters involved in  
24 Paragraph 15 rather than 14, but if the eight and four  
25 could not agree on either one, that is, the eight of you



1 cs8 71

2 were not prepared to make the finding made by the four  
3 and vice versa, then you could not convict that defendant  
4 on the basis of putting together those eight votes and  
5 four votes.

6 To repeat, you would have to be unanimous,  
7 all 12 of you would have to agree with respect to any  
8 particular defendant in connection with Count 2 that that  
9 defendant was guilty of the same false statement or the  
10 same material omission, otherwise I say you could not  
11 convict him and that applies to all the defendants under  
12 that count.

13 Now I come to the third element of Count 2,  
14 which is again the requirement of proof that any defendant,  
15 before he may be convicted, acted knowingly and wilfully.

16 Now, I repeat, this requirement of criminal  
17 intent for shorthand is present throughout the indictment.  
18 I have gone over with you the meaning of those words and  
19 the things you may and should consider in connection with  
20 them, and I now instruct you that everything I said on  
21 that subject under Count 1 applies again under Count 2,  
22 namely, the requirement of a showing of deliberately  
23 wrongful and purposeful misconduct and not merely negligence  
24 or mistake; the requirement that the defendant be shown  
25 not to have been acting in good faith and your consider-

1 cs9 72

2 ation ultimately of all the circumstantial evidence and  
3 direct evidence that has been placed before you in  
4 resolving that key issue in the case.

5 We come to a group of six counts, Counts 3  
6 through 8 that begin at the bottom of page 8, and those are,  
7 for shorthand, the mail fraud charges. If you look at  
8 the bottom of page 8 and you see the allegations you see  
9 again how the basic alleged scheme recurs here and how  
10 a different aspect of the allegedly wrongful behavior  
11 becomes the basis for alleged federal criminality, here  
12 alleged mail fraud, and the basis for federal intervention  
13 is, of course, the power of the Federal Government over  
14 the mails and their uses, so you have here again the  
15 reallegation of the scheme or artifice to defraud Homex  
16 stock purchasers and others. You have the specific  
17 reallegation of the things alleged in Count 1, and then  
18 you have alleged to constitute each count in the way our  
19 law words a particular use of the mail in connection with  
20 the carrying out of that mail fraud scheme, and, as I say,  
21 in the theory and administration of this statute each  
22 such use of the mail, very strictly speaking, may consti-  
23 tute and may be alleged as a separate count or crime,  
24 and that is what is done in this indictment.

25 Once again in considering all eight of these



cs10 73

counts your question may be stated in terms of the requirement of proof of the three essential elements, always again beyond a reasonable doubt, and these are the three essential elements:

First, and most importantly, that the defendant devised or intended to devise a scheme or artifice to defraud the purchasers of Stirling Homex securities and other persons by means of false and fraudulent pretenses, representations or promises.

Second, and I said most importantly for the first element, but let me say equally importantly, that the defendant knowingly and wilfully participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with intent to participate in the fraud.

Third, that the scheme or artifice to defraud involved the particular use of the mails alleged in the particular count.

As to the first element, where there has been proof of the scheme or device or artifice, I have discussed this at great length with you under Count 1. I simply tell you that the definitions and other things that we covered under that count are to be reapplied and reexamined in connection with this one.

cs11 74

Second, the now I trust familiar subject of whether the particular defendant behaved knowingly and wilfully, again you apply the instructions already covered that before any defendant may be convicted under any of these counts, 3 through 8, he must be found to have had an intent to defraud; he must have intended to participate in knowing and deliberate deception, the knowing and deliberate making of a false material statement or the knowing and deliberate omission or concealment of true material facts needed to make what was said true and not misleading, or with an intent to deceive and for the purpose of causing financial loss to others or bringing about financial gain to himself.

The third element is the use of the mails and, though it is an essential element, perhaps this is not or will not be in your judgment as vital or extended a subject as the one presented by the first two elements, but I charge you that in order to establish the charges in Counts 3 through 8, the use of the mails in furtherance of the scheme as that conception, the furtherance of the scheme must be understood in this law, must be proved beyond a reasonable doubt. There must have been a use of the mails which had the purpose of furthering or executing the alleged fraud and, as I say, each count



mcs 75

alleges the particular use said to have constituted that first element and there really isn't much dispute about whether the particular mailing occurred, but it is for you to consider whether it satisfies this requirement of being in furtherance.

I will tell you in that connection that it is not necessary for the Government to have proved that any particular defendant you were considering contemplated the use of the mails or that particular use of the mails as an essential element in the scheme. At the same time, it would not be sufficient if the mails merely came to be used incidentally or coincidentally as a result of the fraudulent scheme.

To make out the kind of use the statute forbids and you must find before there can be a conviction, the use must have been intended or reasonably foreseeable as an incident in the furtherance or execution of continuation of the scheme. I said intended or reasonably foreseeable. In covering that you will understand it is not necessary, as I have said, that any defendant be shown himself to have actually mailed any of the items the Government has introduced, but you must find before you may convict that the defendant, if he did not personally use the mails or tell some directly to make the

mcs 76

particular mailing, you must find that that person at least caused the mails to be used, and I use that word caused again in the sense that this particular statute contemplates. One cannot cause the mails to be used within the meaning of this statute if one either knows that the use of the mails will follow from the working out of the scheme in the ordinary course of business, or if that use, that mailing, is reasonably foreseeable to the defendant in question as part of the events covered by the fraudulent scheme.

Now, the mailed matter for this purpose does not need itself to disclose a fraudulent representation and it is not necessary that the addressee be an intended victim of the scheme. There is no requirement either if the mails are used that they cross state lines, because the mails are under the plenary jurisdiction of Congress within any state or between states.

(Continued on next page.)



1 ljp 77

2 So I say you must find such a use or  
3 causing the use of the mails, as defined, before you  
4 could convict under any of the counts 3 through 3.

5 That brings us to count 9. That is the  
6 conspiracy count. I won't read it to you. Let me  
7 summarize it for you and then, if you so desire, you  
8 may read it since the indictment will be with you for  
9 your convenience when you go to deliberate.

10 Briefly outlined, this count alleges  
11 that the five defendants, for some part of the period  
12 from January, 1968 up to the filing of the indictment  
13 in July of last year, were engaged together in a con-  
14 spiracy to violate various laws of the United States.  
15 And then what you have is mostly an enumeration as to  
16 the objects of this conspiracy, of laws that we have  
17 already encountered, plus one or two others.

18 Paragraph 2 of this conspiracy count  
19 there on page 10 alleges that it was part of the  
20 conspiracy to violate a statute which we have not  
21 encountered which forbids the making of false statements  
22 for the falsification or concealment of material facts  
23 in connection with matters that are within the jurisdic-  
24 tion of any department or agency of the United  
25 States.

2jpa 78

Paragraph 4 charges a conspiracy to violate the portion of the Securities Act of 1933 which is the subject of the substantive charge, as we call it, in count 1 of the indictment.

Paragraph 5 charges that the defendants conspired to make false statements or wrongful omissions in registration statements filed with the SEC, and that, as you know, is the subject of the substantive charge in count 2 of the indictment

Finally, paragraph 6 alleges that the defendants conspired to make false and misleading statements with respect to material facts in annual and quarterly reports required to be filed with the SEC in violation of the 1934 Act, which I have mentioned but which is not in the prior counts the subject of any alleged substantive violation.

In speaking of this conspiracy charge, and earlier as well, I have referred to substantive charges and I have characterized as the substantive counts counts 1 through 8, and I have used that word and tried to put vocal quotation marks around it to distinguish substantive offenses from the notion of conspiracy. While I think you probably have it, it can't hurt for me to make that distinction a little



jpa 79

more pointed for you by an illustration that doesn't have anything to do with this case.

The gist of the crime of conspiracy, as I will be reminding you in about two minutes, is an unlawful agreement or combination, a plan or a scheme to commit a crime. As I say, it is that agreement with certain admissions that I will be telling you about that is the crux or the gravamen, as lawyers say, of the crime of conspiracy. We distinguish that conspiratorial arrangement from the substantive offense which the conspirators were conspiring to carry out.

To illustrate: you can have a conspiracy to rob a bank -- and I trust this doesn't relate to this case; I think it does not. It is meant not to. Now, if the conspirators got together and really agreed, knowing what they were doing, that they were going to rob a certain bank, and if they took -- and I will be telling you about this -- at least one step or said one further thing toward the carrying out of that bank robbery, and if they knew and deliberately intended what they were doing, they could be guilty of the crime of conspiracy even though they never got around to robbing the bank.

Now, with that setting, the bank robbery

1 jpa 80

2 is the substantive offense and the agreement, plan to  
3 do it is the conspiracy. Here the ninth count differs  
4 from the other eight in that it charges a conspiracy  
5 and not a substantive offense. The only thing I will  
6 add to that in a particular case, and this is such a  
7 case, a person may be charged with both the conspiracy  
8 and the substantive offense and if the evidence sustains  
9 these charges beyond a reasonable doubt may be convicted  
10 of both..

11 With that, let's follow the form of  
12 analysis that has become familiar to you and let me tell  
13 you again there are three essential elements that must  
14 be proved beyond a reasonable doubt before any of these  
15 defendants may be found guilty of the charge in count  
16 9, the conspiracy count.

17 First, that for some period between 1963  
18 and July of 1976 there was a conspiracy in existence  
19 among any two or more of the defendants to commit at  
20 least one of the crimes alleged in count 9. One  
21 of those substantive crimes, namely, a violation of the  
22 false statements statutes or of the mail frauds statute  
23 or of the securities laws as those are enumerated  
24 in this ninth count.

25 Second, that any defendant you are



1 jpa 81

2 considering at any particular time knowingly and wilfully  
3 became a participant in the conspiracy with knowledge  
4 of at least one of its criminal purposes; and,

5 Third, that at least one of the con-  
6 spirators committed at least one overt act in the  
7 carrying out of that conspiracy during the course of  
8 the conspiracy and, specifically, that at least one  
9 of the two overt acts alleged at the very end of the  
10 indictment, at pages 12 and 13, has been proved beyond  
11 a reasonable doubt.

12 Again, I am going to follow a familiar  
13 practice and elaborate on each one of those elements.

14 First, the requirement of proof that the  
15 conspiracy, a conspiracy of the kind here alleged,  
16 actually existed.

17 I have told you already the essential  
18 nature of the notion of conspiracy. I repeat, a  
19 conspiracy for our purposes is defined as a combination  
20 or an agreement of two or more persons by concerted ac-  
21 tion to carry out some criminal or unlawful purpose.  
22 I told you it is that kind of combination or agreement  
23 that is the gist of the crime of conspiracy.

24 Illustrating that in a somewhat banal  
25 poetry to which lawyers are somewhat addicted, it



jpa 82

1 is often said conspiracy is a kind of partnership in  
2 crime, but it is a useful concept. The notion is  
3 that each member of the conspiracy becomes, for their  
4 criminal purpose, the partner or agent of every other  
5 member of that conspriacy. While we talk of agree-  
6 ment and even of partnership in this setting, you  
7 will also understand that those words don't have here  
8 their normal lawful, business meanings. It is not  
9 necessary to have a criminal conspiracy, and your  
10 experience would teach you it normally wouldn't happen  
11 that people get together and engage themselves by  
12 formal agreement to pursue a course of criminal  
13 conduct. Your common sense tells you that where there  
14 is a conspiracy, if there is a conspiracy, much of it  
15 will have been created and will consist of tacit and  
16 informal understandings between or among the partici-  
17 pants.  
18

19 You will also understand since formali-  
20 ties are not the essence of this kind of wrongful be-  
21 havior, that the existence of a conspiracy, if one  
22 existed, is a determination that commonly has to be made  
23 by the analysis of a good deal of circumstantial rather  
24 than direct evidence. Obviously if people say  
25 direct words of conspiracy, "Let's get together and rob



1 jpa 83

2 a bank,"such direct evidence would be germane, rele-  
3 vant. But I am saying to you that you don't need  
4 such direct evidence, often you don't have it, and  
5 frequently whether there was a conspiracy or not is  
6 a conclusion to be reached after a careful and thorough  
7 examination of all the circumstantial evidence  
8 said in the particular case to have a bearing on that  
9 subject.

10 Now, I have told you a conspiracy may  
11 be found to have existed even if its goal wasn't achieved,  
12 even if its purpose wasn't carried out. At the  
13 same time the fact, if you found it, that the purpose  
14 was carried out may itself be taken as some evidence  
15 of a conspiracy, though not all the requisite evidence.  
16 And if two people were together to rob a bank, that  
17 might turn out to be part of the evidence on which  
18 you might decide in the end that they had been in a  
19 c?nspiracy to do that. As I say, your job will  
20 be to take all the evidence together, put it all to-  
21 gether, and decide then at the end of that kind of  
22 appraisal and synthesis whether there has been proof  
23 beyond a reasonable doubt that there was a conspiracy  
24 d uring the period in question to pursue at least  
25 one of the unlawful objects enumerated in count 9

1 jpa 34

2 of the indictment. If you are convinced of that,  
3 it would not make any difference, except in one  
4 respect of some importance, how long the conspiracy  
5 was in existence.

6 If you are reading the indictment, the  
7 language may mislead you slightly in this respect.  
8 In the ancient forms of criminal proceeding this  
9 indictment in count 9 says from on or about the 1st  
10 day of January, 1968 up to the date of the filing of  
11 the indictment there was this conspiracy.

12 Well, all that you need to know about that  
13 is that the government does not have to prove the  
14 whole of that theory. It is sufficient if it proves  
15 for some time within that whole period the kind of  
16 conspiracy charged here was in existence.

17 Now, timing has one other significance in  
18 this case and that relates to the statute of limita-  
19 tions, about which I will give you some separate,  
20 additional instructions in a few minutes. Let me say  
21 now, while we are on the subject, that while the  
22 totality of the period is not essential, you could  
23 not convict on the conspiracy count unless you were  
24 persuaded beyond a reasonable doubt that the con-  
25 spiracy existed or continued for at least some time on



1 jpa 85

2 or after July 27, 1971. The reason for that, which  
3 is the statute of limitations, as I say, I will give you  
4 particular and additional instructions about that  
5 in a relatively little while.

6 Now, I have told you about the alleged fraud  
7 scheme and it is said to have been an object of these  
8 alleged conspirators to conduct, to carry out that  
9 scheme. You will remember and apply under this count  
10 the things that we have talked about in that connection  
11 and the things that define and comprise the kind of  
12 scheme the government charges these people conspired  
13 to conduct.

14 In addition, there are a couple of alleged  
15 kinds of crime the defendants are charged with having  
16 conspired to commit that you have not encountered exactly  
17 in the course of these instructions and I will talk  
18 to you about those.

19 The first unlawful object alleged in the  
20 conspiracy count is the object of violating this so-  
21 called statements statute, that is in paragraph 2 of  
22 the conspiracy count, at the bottom of page 10, and the  
23 reference is to Section 1001 of Title 18.

24 To understand what a conspiracy to rob a  
25 bank might be you have to have a notion of what a bank

1 jpa 86

2 robbery is and what the bank robbery statute forbids.  
3 Similarly, to understand the accusation that people  
4 conspired to violate the false statements statute,  
5 Section 1001, you have to have a sense and understand-  
6 ing of what that statute forbids. I think it is not  
7 very deep or technical. I think it may suffice  
8 substantially to read to you the essential words of that  
9 statute.

10 It says that anybody commits a crime if  
11 in some manner, within the jurisdiction of some depart-  
12 ment or agency of the United States, he conceals or covers  
13 up by any trick, scheme or device a material fact,  
14 or makes any false, fictitious or fraudulent  
15 statements or representations, or makes or uses any  
16 false writing or document knowing the same to  
17 contain any false, fictitious or fraudulent statement  
18 or entry.

19 Now, the charge is that the conspirators  
20 conspired wilfully and knowingly to violate this  
21 false statement statute. It has to be a covering  
22 up or concealment or false statement in a matter within  
23 the jurisdiction of a department or agency of the  
24 United States.

25 I will instruct you simply for that purpose,



1 jpa 87

2 because it brings your attention to the allegations and  
3 the issues with which you will be concerned, that the  
4 Securities and Exchange Commission and the Farmers Home  
5 Administration are, within the meaning of 1001, agencies  
6 of the United States.

7 The charge in paragraphs 3, 4 and 5,  
8 as I have told you, are charges of the substantive  
9 offenses thaet you have met with in earlier counts of  
10 this indictment.

11 Finally, paragraph 6 on page 12 says  
12 that:

13 "It was further a part of said conspiracy  
14 that the defendants unlawfully, wilfully and knowingly  
15 would and did make false and misleading statements with  
16 respect to material facts in annual and quarterly  
17 reports required to be filed with the SEC ion violation  
18 of" that cited section of the 1934 Act.

19 I instruct you very simply in this connec-  
20 tion that the rules and regulations of the Securities  
21 and Exchange Commission require, and lawfully require,  
22 the filing of annual and quarterly reports by various  
23 corporations, including such a corporation as Stirling  
24 Homex, on forms known as Form 10-K and 10-Q.

25 This count, count 9, charges a conspiracy,

jpa 88

a single, overall conspiracy. I instruct you that the government, before you may convict, must have satisfied you beyond a reasonable doubt that it has proved the conspiracy it charges. That is to say, if the government hasn't satisfied you that there was such a conspiracy, that it has only proved or perhaps it may have proved a variety of different and unconnected crimes by these different people, there would be a failure of proof on count 9 and you would have to acquit because the first essential element, the existence of the conspiracy charge, would not have been established.

Let me also say that if the government establishes the kind of single, overall conspiracy it alleges, it is not required that it prove that the conspiracy had all of the several objects alleged in the indictment. That is to say, this conspiracy could be sufficiently established, count 1 could be sufficiently established, if the government has satisfied you that the objective of the conspirators was either to make false statements of the kind forbidden by 1001 or to file false and misleading reports with the SEC, 10-K and 10-Q reports, or to use the mails to defraud in a way that the substantive charges allege



jpa 89

in counts 3 through 8 or to use the facilities of interstate commerce in furtherance of the scheme to defraud charge in count 1 of the indictment.

As I say, it is not necessary that the scheme had contemplated conduct that would constitute violations of all the substantive statutes involved. It is sufficient if the government has shown that the conspirators had one of those unlawful objectives. But at the same time, you must be satisfied that there was at least one before you may convict any defendant on this count. Now, that is element No. 1.

If you find -- let me put it negatively -- if you don't find proof of element 1, the conspiracy, your task will be ended on count 9 and you must acquit everybody. If you do find that there was such a conspiracy, you reach, at least in logical order, the second essential element: is the particular defendant you are considering, focusing on them one at a time surely for this purpose, shown beyond a reasonable doubt to have been a participant in or a member of that conspiracy? I stress that that question must be studied by you with particular and specific reference to each of these different and differing defendants one at a time.

1 jpa 90

2 That is an illustration, but a very vital  
3 illustration, for a conspiracy charge or a broader prin-  
4 ciple that you know: that we don't follow doctrines  
5 of guilt by association. Guilt or innocence is an  
6 individual matter and each individual on trial is entitled  
7 and has a right to expect that his position and the  
8 outcome for him will be determined by particular and  
9 special reference to him as a separate human  
10 being.

11 So basically the participation of any  
12 person, any defendant, in a conspiracy, if it is to  
13 be established, must be established by evidence as to  
14 his own words and his own conduct in general.

15 I hasten to add something that I think you  
16 know but that I remind you of, that anybody's words or  
17 conduct may require reference to the conduct or words  
18 of other people in order to have a full understanding  
19 of the nature of that person's actions or statements.  
20 A conversation doesn't make any sense unless you  
21 consider the participants, not merely one alone.  
22 So it is with much of our conduct and many of the  
23 things that we say in this life. So as you study  
24 the things that any defendant did or said or did not  
25 do or did not say you will be considering the



1 jpa 91

2 behavior of each person involved in connection with  
3 the behavior of other people to the extent that there  
4 are connections shown and that those connections must  
5 be analyzed in order to understand correctly what anyone  
6 said or did.

7 There are also some doctrines about actions  
8 and statements of co-conspirators and I will tell  
9 you about that in a little while. But first, sticking  
10 with this question of membership in a conspiracy,  
11 let me stress to you that before you may find any  
12 defendant was a member, if you find there was a  
13 conspiracy, you must find that he knew at least one  
14 of those unlawful purposes and that he knowingly  
15 associated himself with one or more of the others  
16 intending to help carry out that purpose of those  
17 purposes.

18 The government must on this second essential  
19 element establish beyond a reasonable doubt that a  
20 defendant entered into the conspiracy aware, as I  
21 say, of at least one purpose or objective with a  
22 specific intent to participate in the violation or the  
23 attempted violation of those substantive prohibitions  
24 that we have talked about. \*

25 Putting it negatively, let me say and



jpa 92

stress to you that mere association with one or more conspirators does not make you a member of the conspiracy. Nor is knowledge that there is a conspiracy underfoot sufficient to establish membership. What is necessary before you may find membership or participation is your being satisfied that the defendant associated himself, however informally, with the conspiratorial scheme or plan knowing at least one of its purposes and intending in some way by his participation to help bring about the achievement of the purpose or purposes.

Now, if a person does participate in this way in the conspiracy with knowledge, he may be a member of the conspiracy even if he participates only in some parts or aspects of the overall conspiratorial enterprise. He may be a member even if he rarely sees other members and even if some of the members are people that he never sees or never deals with either directly or indirectly. That is to say, the guilt of a conspirator, if the requisites that I have now told you about, this knowing participation, are established, does not depend on the extent or measure of the participation, as is true of lawful enterprises. You



1 jpa 93

2 can be in a conspiratorial enterprise, you can be a  
3 conspirator even though your role is different and  
4 separate and subordinate in comparison to the roles  
5 of others.

6 You do not need to be in the conspiracy  
7 throughout its life. You may join after it has  
8 begun. If you do, you may be held liable for what  
9 has gone before you joined yourself with the others  
10 to carry through their unlawful enterprise.

11 And so with these thoughts before you to  
12 be followed, you will consider these defendants one at  
13 a time and you ask, with respect to each one, consider-  
14 ing all the evidence that does or does not touch him  
15 one way or the other, did he join this conspiracy  
16 as it is outlined in count 9 with an awareness of  
17 at least one of those illegal purposes, intending  
18 to participate in carrying out that purpose or more  
19 than one of those purposes.

20 As I say, if you find that, you may  
21 find a person a full member or full participant, you  
22 may find, in other words, that essential element  
23 No. 2 has been established for him even if his partici-  
24 pation was limited in time and in the substance of his  
25 actions in connection with the others.



1 jpa 94

2 I mentioned to you this notion in connec-  
3 tion with conspiracy of a kind of agency. The  
4 motion that in a conspiracy one conspirator may  
5 be deemed for several purposes to be the agent of  
6 every other. One of the things that follows from  
7 that is that if you, the jury, find from a preponderance  
8 of the independent evidence as to any one of these  
9 defendants that he was a member, then the acts or  
10 declarations of other people which are committed  
11 during the course of the conspiracy and in further-  
12 ance of it, the acts or declarations of co-conspirators,  
13 may be used against that first defendant in making  
14 your ultimate determination in this case.

15 Remember, that rule, that kind of agency  
16 rule, applies only while the first person is a member  
17 and the second person is a member, and only where that  
18 second person, if he commits some conduct or makes  
19 some statement, is acting or talking during the  
20 existence of the conspiracy and its furtherance.

21 To put that negatively, at any point where  
22 either of them is not a member of the conspiracy, the  
23 that use of the acts or declarations of one against the  
24 other is not permitted.

25 You may remember in enforcing that rule,



1 jpa 95

2 even while the evidence was coming in, there have been  
3 times when it seemed useful and necessary to mention  
4 to you that certain evidence was being received and  
5 could only be used against one or another of these  
6 defendants. Because there, for example, in  
7 testimony this past year before the grand jury, it  
8 is perfectly clear that anybody who testified there,  
9 whatever he said, whether or not it was incriminatory  
10 as to him, was not then acting as a member of this  
11 conspiracy and was not then acting to further it,  
12 and whatever significance, if any, that kind of testimony  
13 may have, it cannot touch or affect any of the other  
14 members of the conspiracy, at least in the cases where  
15 I gave you such instructions.

16 You cannot be a member of a conspiracy,  
17 and surely you understand this from all I have said,  
18 inadvertently or accidentally. These people are  
19 charged with conspiring wilfully and knowingly.

20 I told you knowledge and participation are required.  
21 I simply remind you that you have heard those words,  
22 wilfully and knowingly, before and that everything I  
23 have said in trying to explicate them is applicable again  
24 here and you will follow those instructions.

25 If there was a conspiracy and if one or



1 more defendants have been found to have been members  
2 nobody can be convicted unless one additional essential  
3 element is established and the requirement of proof  
4 of at least one overt act. The theory of that, very  
5 briefly, is that people might talk about committing  
6 a crime and then stop right there, might not say  
7 anything or do anything to carry out the criminal  
8 purpose. In general, it has been thought in our  
9 law that should not be made criminal, mere talk, stopped  
10 at that point. So in order to make out a charge of  
11 conspiracy in this and most cases the prosecution must  
12 prove at least one overt act, one thing said or done  
13 to carry out at least one of the unlawful purposes.  
14

15 There are two overt acts alleged here.  
16 You must find that at least one of them has been  
17 established beyond a reasonable doubt before you  
18 may convict anybody. The overt act for this purpose  
19 need not have been an overt act committed by any  
20 particular defendant you are considering. That  
21 is to say, if you were to find, just hypothetically,  
22 that elements of 1 and 2 have been proved against  
23 some defendant other than Harold Yanowitch and if  
24 you were to find that overt act No. 1 has been  
25 proved beyond a reasonable doubt, that is something



jpa 97

A 651

1  
2 alleged to have been done by Harold Yanowitch, that  
3 would be sufficient to make out the third essential  
4 element as against any other defendant in the case.  
5 It need not be an overt act performed by the particu-  
6 lar defendant you are considering.

7 The same applies to overt act No. 2, alleged  
8 to have been done by defendants William and David Stirling.  
9 That overt act is sufficient against the others if  
10 any of the others have been proved beyond a reasonable  
11 doubt to have been members of a conspiracy that you  
12 have found beyond a reasonable doubt was in existence,  
13 and specifically a conspiracy of a kind we have defined.  
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mcs 98

Now, there is one other respect in which the charge of conspiracy as a legal matter plays back on the first eight counts, the substantive counts, or may play back upon them, and that again relates to this agency idea, the notion that conspirators are partners or agents of each other. Briefly, if you were to find guilt on the charge of conspiracy there might be under our law a basis on which you could find a member of the conspiracy guilty on one of the substantive offenses even in the absence of his direct participation in that substantive offense.

Now, in what purports to be an attempt to elucidate that I am going to read you an incredibly long sentence as it came out here and ask you to bear with it until I break it down afterwards, but in the somewhat cumbersome way the law requires us to spell out the concept I have just given you, it goes like this:

If you were to find beyond a reasonable doubt that the conspiracy charged in this case existed, and if you were to find that one or more of those substantive offenses in Counts 1 through 8 were committed by one of the conspirators, and if you were to find that the acts constituting that substantive offense were done in furtherance, in the carrying out of the conspiracy, and if you were to find that some other member of the con-



1 cs2 99

2 spiracy who did not commit the substantive act can  
3 reasonably have foreseen that those substantive offenses  
4 would be committed, you may find that other member of the  
5 conspiracy guilty of those substantive offenses, even  
6 though, as I say, he did not directly participate in the  
7 acts constituting that offense and even if he didn't have  
8 direct knowledge that that substantive offense or sub-  
9 stantive offenses were being committed at that time.

10 Now, let me try to illustrate that again by  
11 reference to the bank robbery situation, because it is  
12 irrelevant to this case. Consider a conspiracy between  
13 A and B and you can add C and D, if you like, to rob a  
14 bank. Those people might understand or foresee without  
15 any explicit discussion that some member of their con-  
16 spiracy at some point would be proceeding to handle the  
17 procurement of weapons for purposes of carrying out the  
18 bank robbery.

19 Now, if one member of the conspiracy while  
20 it was in existence and for the purpose of implementing  
21 it went ahead and robbed some guns from a store or other  
22 place, and if, as I said, he did that in order to help  
23 his fellow conspirators and help carry out the bank  
24 robbery, a jury in such a case might be permitted to  
25 hold the other conspirators liable if all the other



1 cs3 100

2 elements were made out for that substantive offense of  
3 robbing the gun store, even though those other conspirators  
4 didn't participate directly and didn't know that their  
5 partner in crime, X, at that particular time was carrying  
6 out his foreseeable, intended or not, mission of obtaining  
7 the weapons for the conspiratorial job. - - -

8 With that I have concluded the instructions  
9 you are to have on the nine counts specifically and on  
10 the issues that you are to confront in dealing with them.  
11 There is a fair amount, but I hope tolerable, of additional  
12 things that you must know and I will proceed to them.

13 I mentioned the statute of limitations.  
14 There is applicable to this case and to most federal  
15 criminal cases a five-year statute of limitations. That  
16 means, very simply, that for most crimes the indictment  
17 must be filed within five years after the commission or  
18 completion of the crime. This indictment was filed on  
19 July 27, 1976. That means that you can't convict any  
20 defendant unless you find that the criminal conduct with  
21 which you may find him involved was committed or continued  
22 after July 27, 1971.

23 The Government for that purpose points to a  
24 number of things and events alleged to have happened after  
25 July 27, 1971. The Government contends that these



1 cs4 101

2 events show that each of the crimes charged in the indict-  
3 ment was committed or continued after July 27, 1971.

4 Merely as one example, you remember, and this-  
5 I suppose is undisputed, that the registration statement  
6 for ~~the second stock offering~~ was filed or became  
7 effective on July 29, 1971, and that on August 5, 1971  
8 Homex received the \$19 million from the sale of the  
9 preferred stock covered by that registration.

10 Count 9, the conspiracy count about which I  
11 -- have just been talking to you, charges that the defendants  
12 agreed together that they would make a false statement,  
13 and the Government relies on a number of such alleged false  
14 statements after July 27, 1971.

15 Now, that issue as to the statute of limit-  
16 ations will be resolved in favor of the Government if you  
17 find that any particular defendant you are considering  
18 did either one of two things:

19 One, that he participated in at least one  
20 criminal act after July 27, 1971, or, two, that he  
21 continued to remain a member of a criminal conspiracy or  
22 a criminal scheme to defraud after that date knowing or  
23 foreseeing a reasonable likelihood that at least one  
24 act remained to be performed in order to further that  
25 conspiracy or carry out that scheme to defraud.

1 cs5 102

2 On the other hand, if you find that a defendant  
3 participated in one or more criminal acts but not after  
4 July 27, 1971, and that he joined a conspiracy or a scheme  
5 to defraud but on such a partial or limited basis that he  
6 did not foresee a reasonable likelihood that any act  
7 remained to be performed after July 27, 1971 in connection  
8 with the conspiracy, then the statute of limitations would  
9 require you to acquit that particular defendant.

10 Now, in studying your problem under the  
11 statute of limitations you will have in mind the principle  
12 that I have just talked to you about, that a conspirator  
13 may be held responsible for an offense committed by his  
14 co-conspirator even though the one being held responsible  
15 did not actually participate in the commission of that  
16 offense.

17 You may also consider a further principle and  
18 that is that a conspiracy once formed is presumed to  
19 continue until its objectives are accomplished or there  
20 is some affirmative act of terminating the conspiracy by  
21 its members.

22 Likewise, once a person is found to be a member  
23 of the conspiracy, if that is found, he is presumed to  
24 continue being a member until the conspiracy ends or until  
25 he takes some affirmative action supplying affirmative



1 cs6 103

2 proof that he withdrew or disassociated himself from the  
3 other conspirators.

4 Now to go to a subject much less technical  
5 and perhaps much more critical in the end, the subject of  
6 credibility of witnesses. That is a key problem for  
7 juries. I think it is reasonably safe to suggest that  
8 you probably heard more than once perjury from the witness  
9 stand in this case. Beyond that, of course, you have  
10 heard lots of conflicting statements about what happened  
11 or didn't happen, about what was said or was not said,  
12 and you are relying on the net effect of those witnesses  
13 in the last analysis for your discovery of the truth, for  
14 your accurate recreation of the events upon which you  
15 will base an accurate and just decision, and that is the  
16 problem of credibility.

17 Now, it is a standard item and I suppose it  
18 should be in instructions to juries, but it is not a  
19 technical-legal specialty. Lawyers and judges, at least  
20 in this country, are not thought to be specialists in  
21 appraising people's credibility and that is why we bring  
22 people like yourselves, usually lay people so far as the  
23 law is concerned, to the Courthouse to decide such issues  
24 and that will be one of your central and most difficult  
25 and important tasks.



cs7 104

1  
2 I'm sure you will be appraising and assessing  
3 all of the witnesses you have heard. You have seen them,  
4 you have studied how they testified as well as what they  
5 said, and it will be your responsibility and your sovereign  
6 authority to decide which one of them you believe and to  
7 what extent and consider how each witness impressed you.  
8 Did he or she appear to be truthful, candid, frank and  
9 forthright, or did the witness appear to be evasive or  
10 shifty or simulating or artificial in some respect?  
11 Did the witness seem to know what he or she was talking  
12 about and, more importantly, did the witness appear to  
13 have a purpose to convey to you accurately what he or she  
14 knew? Did the witness seem to have a good and plaus-  
15 ible memory? Given the lapse of time since many of  
16 these events, were their failures of memory understandable  
17 and plausible or were they selective and suspicious? Did  
18 the inability to recollect reflect in any degree a desire  
19 of something less than a determination to tell you the  
20 absolute and total truth as the witness knew it? Was  
21 the witness consistent or self-contradictory? How did  
22 the direct examination compare with the cross-examination?  
23 How far was the testimony corroborated or not corroborated  
24 by other testimony and by the documentary evidence that has  
25 been placed before you? How plausible was the story



1 cs8 105

2 altogether? That doesn't mean that implausible stories  
3 are always untrue. Sometimes they are true, but it is  
4 one of the factors that one takes into account in appraising  
5 credibility. All such things, and the illustrations I  
6 have mentioned will be among the matters you consider, in  
7 judging credibility.

8 I will mention some others because they are  
9 perhaps important and should not be overlooked. You want  
10 to consider the motive or motives of any particular person  
11 who appeared on the witness stand. What motive did a  
12 witness have to lie? To what extent was the witness  
13 free of any motive that might affect the accuracy or  
14 liability of his or her testimony? You have heard a lot  
15 of argument about this. You probably realize anyhow  
16 that this is something that you want to consider.  
17 I remind you of it.

18 You have heard some witnesses who were  
19 involved directly and significantly in the transactions  
20 which gave rise to the case. Some of them have been  
21 or are in litigation about those transactions. You  
22 consider what interest they may have had and how that  
23 interest, if any, may have reflected their testimony.

24 Among interested people who testified you  
25 have heard three of the defendants themselves, and you



1 cs9 106

2 would know without my saying that a defendant in a  
3 criminal case has a deep and profound and abiding interest  
4 in the outcome of that case. Obviously that is among  
5 the factors you will take into account in appraising  
6 the credibility of those witnesses.

7 You have heard testimony from accomplices as  
8 it were, from people who describe themselves as having  
9 participated directly in some of the wrongful acts with  
10 which one or more of the defendants is being charged.  
11 You have heard people, some of those in that accomplice  
12 category, who apparently entertained concerns about their  
13 own exposure to criminal liability who testified following  
14 the granting of immunity at one time or another, and  
15 you may take that into account.

16 In the case of all such witnesses who say  
17 they were accomplices or have been immunized you may  
18 consider whether any of them had a reason to be unwilling  
19 to tell you the full extent of their own involvement and  
20 whether any of them had reason to shift responsibility  
21 from themselves to other people.

22 In considering whether they may have sworn  
23 falsely in this respect, you may also take into account  
24 that the cases at least where immunity has been granted,  
25 the immunity has been conditioned on the undertaking of



1 cs10 107

2 the witness to tell only the truth here and elsewhere  
3 with the stipulation that the immunity would end if the ---  
4 person was deemed to ~~tr~~ ly falsely, and you may weigh  
5 that with and against the several other things that I have  
6 mentioned.

7 Now, I have talked about interests throughout  
8 of accomplices and immunized witnesses and defendants and  
9 so on. I think you know whether I said it or not that  
10 the fact that somebody is interested doesn't mean he is  
11 lying. If that were true we simply wouldn't let  
12 interest of people testify. I mentioned interest and  
13 particularized it a little bit, recalling to you the  
14 arguments you heard which were much lengthier simply to  
15 remind you, as I do again, that that is a factor to take  
16 into account in judgment credibility.

17 If you find on your credibility determination  
18 that any witness has testified falsely to you with respect  
19 to any material fact it is among your sovereign  
20 prerogatives to reject all the testimony of that witness,  
21 if you think that makes sense, or you may credit so much  
22 of the testimony as you think should be credited in helping  
23 you to do what is your ultimate and critical job, to  
24 find the truth and make a verdict based on the truth.

25 You remember certainly that no witness is



1 cs11 108

2 better or worse than any other witness based on the party  
3 who called him or the status he may happen to have or  
4 lack. - The Government witnesses and the non-Government  
5 witnesses start out on a par, all witnesses start out  
6 on a par, and each of them must be gauged by you to  
7 determine whether he or she was credible and to what  
8 extent.

9 I told you I wasn't going to marshal or --  
10 summarize the evidence, but the instructions must include  
11 a couple of observations not really of the deepest vitality,  
12 but relevant, a couple of observations about certain  
13 aspects of the evidence. You have heard some expert  
14 testimony in this case. You have heard testimony speci-  
15 fically by handwriting experts, document experts.

16 Now, I guess you know, and maybe some of our  
17 conversations in rulings and objections have made it  
18 clearer to you, that normally in our system people who  
19 come to be witnesses are permitted only to tell primarily  
20 their own experience, what they saw, heard, did in  
21 participation. There is an exception for so-called  
22 experts. Some people by education or training or  
23 experience are thought to have acquired a special expertise  
24 in some field or other which may range from surgery to  
25 fingerprints, from handwriting to French poetry, and where



1 csl2 109

2 such an expert is qualified under our rules the expert  
3 may give opinions within the realm of his or her expertise,  
4 and you heard these handwriting people. What I'll tell  
5 you about them is simply this:

6 They are part of the evidence placed before you.  
7 You are not required to accept or follow what they have  
8 said automatically and you should not follow ~~automatically~~  
9 the views of any expert. The ultimate decision is for  
10 you. If the experts disagree it is for you to resolve  
11 the disagreement, and insofar as they have told you that  
12 handwriting was or was not or might or might not have  
13 been attributed to somebody or somebody else or nobody,  
14 the ultimate decision on that attribution is your decision,  
15 using the expert testimony for its limited purpose to  
16 help you to reach a sound decision, which is your exclusive,  
17 ultimate responsibility.

18 I want to mention character evidence. You  
19 have heard some character witnesses testifying to the  
20 reputation of Mr. Phillips for honesty, integrity and  
21 truthfulness.

22 Now, evidence as to reputation may be a basis  
23 in our system of trials upon which you may draw inferences  
24 as to the character of the person whose reputation is in  
25 question. If you find that the defendant about whom you



1 csl3 110

2 have heard such testimony has a character that reflects  
3 honesty and integrity and truthfulness that is a fact that  
4 you will and should take into account together with all  
5 the evidence in considering whether it is probable that  
6 this particular defendant would commit the kind of crime  
7 with which he is charged.

8 The circumstances of any particular case may  
9 be such that evidence of good character alone may create  
10 a reasonable doubt of a defendant's guilt, even though  
11 without such evidence no such reasonable doubt would have  
12 existed.

13 However, evidence of good reputation, of  
14 good character, does not constitute an excuse to acquit a  
15 defendant if the jury, after weighing all the evidence,  
16 including the character evidence, is convinced beyond a  
17 reasonable doubt that the defendant is guilty of one or  
18 more of the crimes charged.

19 We approach the end, and I think we will make  
20 it before lunch. Let me say a few more words about the  
21 evidence you have heard and maybe haven't heard. I would  
22 suggest, reminding you of the long list of witnesses who  
23 have come before you, that subject to your good judgment  
24 you may conclude that your best bet is to rely on the  
25 evidence you did hear and to speculate relatively little



1 csl4 111

2 on evidence that in these five or more weeks you may  
3 not have heard. At the same time I do instruct you that  
4 if you find that some potential witness could have been  
5 called by the Government or by the defendants or any of  
6 them, I tell you that both sides in our system have a  
7 right to subpoena witnesses and compel their attendance  
8 here from any place in this country. If you find that  
9 a witness could have been called by the Government or by  
10 the defendants and neither side called that witness, then  
11 you are permitted to infer, still within your exclusive  
12 prerogatives, that the testimony of the absent witness  
13 might have been unfavorable either to the Government or to  
14 one or more defendants or to both.

15 On the other hand, it is equally within your  
16 province to draw no inference at all from the failure to  
17 call some particular witness and to base no reliance  
18 whatever on the subject of some absent witness. I remind  
19 you too in this connection that there isn't any duty on  
20 either side to call a witness whose testimony would  
21 be merely cumulative, repetitive testimony already placed  
22 before you.

23 Now we are approaching the end, ladies and  
24 gentlemen. I want to say a few words to you about the  
25 character of your deliberations and the mechanics of your



1 csl5 112

2 deciding this case.

3 When you go to the jury room, though we lost  
4 all our other alternates, Mr. Collins, I think, will have  
5 been excused, there will be 12 of you, and that means  
6 obviously that you will be expected to go there and  
7 reason together, and that means that each of you will  
8 feel it is not merely your privilege but your obligation-  
9 to contribute your own thoughts, your own wisdom to this  
10 collective and difficult task.

11 (Continued on next page.)  
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ljpa 113

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2 By the same token, each of you will  
3 have to go there prepared to listen attentively and  
4 courteously to views of your fellow jurors or other-  
5 wise it doesn't work.

6 If you have an opinion at some time during  
7 the deliberations on any subject and then you are led  
8 by rational persuasion to change it, you won't hesitate  
9 out of stubbornness or pique to take that rational  
10 judgment and change your opinion. On the other hand,  
11 if you have an opinion and you hold it rationally and  
12 in good conscience, the fact that it happens to be  
13 a minority opinion at any time is not a basis for  
14 requiring or even permitting you to abandon that  
15 earnestly-held opinion.

16 I mentioned to you earlier, and I repeat,  
17 to reach any verdict on any count against any  
18 defendant you must be unanimous. Twelve must vote  
19 for that decision. But that vote of 12 in the  
20 end must reflect the individual conscience and the  
21 individual wisdom and judgment of each one who  
22 makes up a part of that totality.

23 Now, you have five defendants and you  
24 have nine counts. That means quite literally that  
25 there are 45 separate determinations for you to make



1 jpa 114

2 each defendant to be considered separately and each  
3 count to be considered separately. When you have  
4 reached a verdict out practice here is to have it  
5 announced orally by the foreperson, Mrs. Urban -- that  
6 will be your task -- in the courtroom. If you  
7 want to write it down and read it off, that's perfectly  
8 permissible, but that is the procedure we tend to  
9 follow.

10 If, while you are moving toward a verdict,  
11 you need to hear any of the evidence again, send us a  
12 note describing what it is you think you want and  
13 we will try to locate it and have it read to you.

14 I would hope and urge that you don't go  
15 to the jury room and immediately start having the evi-  
16 dence reread. Obviously, the first task is to  
17 try to marshal it and recall it and organize it and,  
18 if possible, to decide on the basis of your collective  
19 recollections. If you need it, send us a note and  
20 we will undertake to find it and give it to you.

21 The same goes, as counsel have reminded  
22 you, for the exhibits. If you need any of those,  
23 describe it the best way you can and we will get it for  
24 you.

25 Sometimes, I might tell you, the interpre-



1 jpa 115

2 tation of jury notes are one of specialty and if there  
3 is some delay it means we are fighting over what to  
4 give you. But we will get back to you as soon as  
5 possible.

6 If you want to hear any of these  
7 instructions again and you send us a note as to what  
8 portion you want read to you, we will have the reporter  
9 read that portion to you.

10 If at any time you send us a note and  
11 you have taken some vote and are divided, don't tell  
12 us how the vote stands. That is a private matter  
13 for the jury on which we are not supposed to intrude  
14 or be invited to intrude.

15 Those are the instructions. I have to  
16 ask you to wait while I see whether there are any  
17 additions or corrections and whether we might want a  
18 recess for that purpose.

19 Does anybody think perhaps we ought to have  
20 a recess?

21 Well, if we don't have a recess we will  
22 do what you have watched us do with rage and pain, fre-  
23 quently go to the side bar. We don't tell jokes  
24 there usually. We just talk about the problems.  
25



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1 jpa

2 (At the side bar.)

3 THE COURT: All right, gentlemen.

4 MR. MUKASEY: In the course of discussing  
5 the objects of the conspiracy, your Honor mentioned  
6 the false statement of the conspiracy and you pointed  
7 out that both the SEC and the Farmer- Home Administra-  
8 tion are agencies for the government within the compass  
9 of that statute. I wonder whether the government  
10 is contending that it introduced any proof of false  
11 statements to the Farmers Home Administration. The  
12 Farmers Home Administration letter obviously contended  
13 to be the forgery. I wondered whether there were  
14 any false statements contended to be made to the Farmers  
15 Home Administration.

16 MR. MAC DONALD: The May 28th exchange  
17 of letters Mr. Phillips submitted was his --

18 THE COURT: A trick of subterfuge.  
19 At least it is a jury question.

20 Other things, Mr. Gaynor?

21 MR. GAYNOR: Your Honor, I want to get  
22 back to the one you said "No, no, thank you" on.  
23 I didn't get a chance to say what I wanted to say, if  
24 you will permit me. That was that in a case of  
25 this kind a reliance is present. That an auditor,



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2 attorney, accountant cannot just close his eyes to  
3 statements made but one should exercise due diligence  
4 in his professional capacity to pursue it. That's  
5 what I had hoped to call your Honor's attention to  
6 before.

7 THE COURT: Okay. You have made your  
8 point but I'm not going to say anything now.

9 MR. FELDSHUH: Your Honor, on the good  
10 character part you singled out Mr. Phillips. During  
11 the course of Bernard Frank's testimony, and I think  
12 several others, and maybe Judge Trammell and Judge  
13 Davis, I did point questions in their direction of not  
14 in the formal sense that we know in 405 and 404 of good  
15 character, but I did ask them about what, based upon  
16 particularly Frank, based on his experience with  
17 Yanowitch, did he always find him to be a man of great  
18 integrity.

19 THE COURT: Who do you say, Frank and who  
20 who else?

21 MR. FELDSHUH: Bernie Frank and Judge  
22 Trammell, and I think I asked the same question of  
23 Judge Davis.

24 MR. MAC DONALD: We would remind the court  
25 that those were fairly limited questions going to the



1 3jpa

2 time when Mr. Frank and Mr. Yanowitch, for example  
3 were partners and did not purport to report to the  
4 jury a broad reputation of his veracity. If they  
5 would have been of that character, we would have  
6 on cross examination asked the witness if he took into  
7 account Mr. Hanowitch's charges here, and accordingly  
8 we would oppose any instruction with respect to  
9 character witnesses which veracity has been produced  
10 in Mr. Yanowitch's behalf.

11 I think Mr. Frank was narrowly asked if  
12 he and Mr. Yanowitch together were held to higher  
13 standards in the practice of law.

14 THE COURT: I don't think you would have  
15 to go through the rigmarole of this character evidence  
16 business which, I must say in the context of this  
17 case, doesn't amount to a hill of beans. Here you  
18 are relying on Bernard Frank, who, if he is accepted,  
19 is going to hang your man, as a character witness.  
20 If you really meant it you had to go through the  
21 ritual by the numbers so the government could do whatever  
22 it is allowed to do.

23 MR. FELDSHUH: I don't know if anything  
24 says I have to.

25 THE COURT: I am so ruling. You didn't



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ask for reputation.

MR. FELDSHUE: I am on the record on it.

THE COURT: Do you want me to say Bernard Frank and Mr. Trammell spoke of --

MR. FELDSHUE: Well --

THE COURT: I will. You can't have it both ways. You didn't put on people like deacons and the like. If you want that I will give it to you, but it was not discernible to me, and I don't remember your putting in any request. I think slightly with deference you mousetrapped me and the government both, but if you want it I will give it to you the way you want it and not otherwise.

MR. FELDSHUE: As long as your Honor feels that way I will withdraw it.

THE COURT: I do feel that way. You have to alert people when you are putting on that type of ceremonial evidence.

MR. FELDSHUE: I think that is all right based on my experience.

THE COURT: Anything else, gentlemen?

MR. FELDSHUE: That's all.

THE COURT: I will let them go to lunch,



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